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CONTENTS

ARTICLES

The "New" Colorado State Land Board ..... *Charles E. Bedford* 347

An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches To Date ..... *Melissa K. Thompson and Jessica E. Jay* 373

Forest Land Taxation in the New Millennium: Stewardship Incentivized ..... *David J. Colligan* 413

Mine Safety and Health Administration Special Investigations—A Primer ..... *Charles W. Newcom* 429

The Federal Mine Safety and Health Act of 1977: Is It Suffering From a Mid-Life Crisis? ..... *Karen L. Johnston* 441

ADDENDUM

Protecting the Boundary Waters Canoe Area Wilderness: Litigation and Legislation ..... *Richard A. Duncan* 463

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THE "NEW" COLORADO STATE LAND BOARD

CHARLES E. BEDFORD*

INTRODUCTION

During the decade preceding the constitutional overhaul of trust land management in Colorado through the passage of Amendment 16[1] in 1996, the Colorado State Board of Land Commissioners (hereinafter the "Board" or the "Land Board") entered into numerous real estate transactions that opened the Board to a high level of public exposure and a great deal of criticism. These deals ultimately led to the demise of the old way of doing business for the Land Board. This article is a discussion of five of these controversial transactions and their political impact. These transactions set the stage for a discussion of the solutions to the historical problems and the possible future direction of the Land Board.

I. HISTORY OF THE COLORADO STATE LAND BOARD UP TO 1996

When Colorado entered the Union in 1876, the federal government gave the state approximately 4.6 million acres of federal lands.[2] The federal government granted the largest portion of these lands for the support of common schools (the "school lands").[3] Today, the state still owns about 3 million of those acres, as well as an additional 1.5 million acres of mineral rights in which the state does not own the surface land.[4] The Board manages all these lands to benefit the School Trust and seven smaller trusts, and the Board has a "fiduciary" responsibility to these beneficiaries.[5] Before the passage of Amendment 16, the Board consisted of three full-time salaried commissioners.[6] Although neither the Colorado Constitution nor state statutes specifically directed the Board to "maximize revenue," courts had interpreted a phrase in the Constitution, which dealt with land sales and directed the Board to receive the "maxi-

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*. Formerly Director of Colorado State Board of Land Commissioners. The views of the author do not necessarily represent the views of the Colorado State Board of Land Commissioners.

1. Colo. Dept. of State, Digest of Initiated and Referred Constitutional Amendments and Laws Voted Upon by the Electorate of Colorado from 1964 to Present, http://www.state.co.us/gov_dir/leg_dir/lcsstaff/research/constnl.htm. Amendment 16, which passed in 1996, was a citizen-initiated amendment to the Colorado Constitution.

2. Sally K. Fairfax, Jon A. Souder, and Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 833 fig. 1 (1992).

3. COLO. CONST. ENABLING ACT, § 1 (hereinafter ENABLING ACT). *See also* Colo. State Land Bd., Answers to Frequently Asked Questions, http://trustlands.state.co.us/general_faq.html.

4. Fairfax, *supra* note 2.

5. Colo. State Land Bd., *supra* note 3.

6. Colorado State Land Bd., Amendment 16: An Overview, http://trustlands.state.co.us/amendment_16.html.

mum possible amount" for acres sold, as meaning that the Board had to obtain the highest price possible on each individual transaction. Efforts to increase revenue for the School Trust and other beneficiaries, coupled with a belief that—as constitutional trustees—the Board did not need to heed the Governor, the Legislature or the citizens of Colorado, but only its beneficiaries, led the Board into numerous highly controversial land deals in the late 1980s and early 1990s.

A. *Seven Utes*

Governor Roy Romer received more letters from opponents of the proposed Seven Utes Ski Resort in Jackson County than from any other single issue that arose during his 12-year term as governor.[7] Without significant public process or notice, Land Board Commissioners (the Governor's appointees) entered negotiations with a California developer to develop a ski resort on trust land in a mountainous area in northern Colorado, located near the top of Cameron Pass along Highway 14 between Fort Collins and Walden in an area also known as the State Forest.[8] Fred Sauer, the developer, approached the Land Board with a plan to develop a ski resort with a large base area.[9] The Land Board pursued a deal to create ski runs and develop a base area.[10] When the deal came to light in the press and public pressure began to mount, the Board scheduled public meetings; the comments overwhelmingly opposed the deal.

Opponents of the development cited a number of concerns; speculation and insufficiency of the promised economic return to the School Trust, high environmental degradation, and greatly diminished future opportunities for the land due to preference for a present-day development scheme. Proponents argued that the income stream was significant and that the project stood to have a spin-off benefit to the depressed economy of Jackson County.[11] The developer planned to locate the ski area on the border between economically distressed Jackson County, a county of less than 1,500 people, and Larimer County, a populous and booming northern Front Range county. Many residents of Jackson County perceived the development as an economic opportunity.[12] The residents of Larimer County viewed the development as a destruction of a natural resource without reasonable due diligence and public comment.

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7. Interview with Doug Young, Environmental Policy Director for Governor Roy Romer in Denver, Colorado (January 20, 1998).

8. *See Gould North Park Ski Proposal*, ROCKY MTN. NEWS, Aug. 19, 1993, at 10A.

9. *See* Kevin McCullen, *Resort Proposal Stirs Fears*, ROCKY MTN. NEWS, Aug. 30, 1993, at 10A.

10. *See id.*

11. *See* Robert Baun, *North Park Ski Resort Could Get Another Lift*, FORT COLLINS COLORADOAN, Feb. 1, 1997, at A3.

12. *See* Baun, *supra* note 11.

In December 1994, due to a massive letter-writing campaign and the Governor's intervention, the Board rejected the development scheme but not without causing an uproar about the Board's lack of public process and behind-closed-doors deal making, as well as concern that the Board had sacrificed long-term stewardship of state lands for short-term and speculative gain. The opponents of the ski area proved to be major activists in the campaign to reform the State Land Board through Amendment 16.

B. *Rangeview*

The Land Board received the former Lowry Bombing Range, a 24,000-acre parcel adjacent to metropolitan Denver, from the Department of Defense in exchange for many small parcels of land outside of Colorado Springs in the early 1960s.[13] The Lowry Bombing Range parcel was considered suitable for development, and the Board contracted with land planners and water developers to pursue the maximization of value for this asset.[14] One of the contracts into which the Board entered allowed for the provision of water and sewer services for the entire parcel of land.[15] Investors created the Rangeview Metropolitan District to provide those services.[16] However, the Board later determined that the contract undervalued the hydrologic asset that Rangeview Metropolitan District intended to exploit. People also criticized the Board for its lack of sophistication and poor business judgment for embarking on the project.[17] A series of scathing newspaper articles critical of the Board's business practices ensued and resulted in a public black eye for the old Land Board.[18]

C. *Hogs*

In 1989, the Land Board entered into a 50-year commercial lease with a company called National Hog Farms for 5,500 acres of agricultural ground outside of Kersey, Colorado. The Board did not place any environmental remediation or environmental technology restrictions on National Hog Farms as part of the lease. At the time the parties signed the lease, the hog farm was the largest commercial confined hog-feeding operation in the United States. Controversy about the operation came to the forefront because of a growing awareness, including a citizen initiative, in Colorado about environmental effects of large-scale commercial

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13. *See* Dan Luzadder, *Water Deal No Deal For Public*, ROCKY MTN. NEWS, Dec. 27, 1994, at 5A.
14. *See id.*
15. *See id.*
16. *See id.*
17. *See generally* Luzadder, *supra* note 13.
18. *See generally id.*

hog farms.[19] Proponents of the initiative asserted that the hog farms had recently immigrated to Colorado since other states had begun to regulate the farms' activities aggressively, while Colorado's law had remained fairly silent on environmental regulation of hog-farming activities. Additionally, National Hog Farms' site along the South Platte River was located next door to the hunting lodge of prominent Denver businessperson Phil Anschutz. Anschutz has supported regulation of confined animal-feeding operations since the mid-1990s and has requested that the Board take aggressive action to prevent degradation of the property on which National Hog Farms operates.

Anschutz questioned whether the original lease was obtained fraudulently and why the Board would choose to allow such intensive uses on its land without close monitoring. Anschutz was the main backer of a successful citizen initiative in 1998 to regulate hog farms. This conflict between a neighbor of Land Board land and a lessee of state trust lands for commercial hog farming will continue to be a problem for the Land Board.

D. *35-Acre Developments*

In 1995, the Land Board entered into a contract with a developer to subdivide the 640-acre "McCoy" parcel, in mountainous southern Routt County, into 35-acre ranchettes. The standard reason that developers divide tracts into 35-acre or larger parcels is to avoid local government oversight and input into their development plans.[20] While this avoidance might be appropriate for private developers, the Routt County Commissioners were understandably disturbed that a state agency would undertake such an action without consulting the local government in charge of land use and planning. Growth issues have been at the forefront in Colorado in the 1990s, and public concern with sprawl development was heightened.[21] In this political climate, the Land Board entered into a contract to divest itself of a high-value property. Because of this action, the Land Board alienated the Routt County Commissioners, as well as many northwest Colorado citizens.

E. *Eagle County*

In October 1996, three weeks before the election in which Amendment 16 passed, the Land Board entered into a complicated three-way exchange proposal to divest itself of nearly all of its lands in the state's, and perhaps the nation's, most expensive real estate market, the Vail

19. Colo. Gen. Assembly, Legis. Council, Colo. Gen. Assembly 1996 Ballot Proposals, Amendment 14, Regulation of Commercial Hog Facilities, http://www.state.co.us/gov_dir/leg_dir/lcsstaff/ballot/text-14.htm.

20. COLO. REV. STAT. § 30-28-101(10)(c)(VIII) (2001).

21. *See Letters to the Post*, DENV. POST, Feb. 19, 1996, at B07.

Valley. The Land Board proposed giving complete development control of 6,000 acres in and around the county's ski resort area to a private developer and in return receive a set dollar figure for all of its interests. The developer received this option to develop 6,000 acres for $5,000. The option was given to the developer by Board decision at a public meeting, but, without any published notification of a pending transaction, it seemed to be the crowning blow to the old Land Board's credibility. Extensive newspaper articles ran both before and after the election, contributing to the public distaste for Board process. Since that time, a similar transaction did not survive district or appellate court review. The Colorado state courts struck down various parts of that deal as being prima facie unconstitutional.[22]

F. *Tension Between Communities and the fiduciary*

The above examples of the historical problems that the old Land Board encountered are examples of the tensions that can arise between communities and a public agency that manages an asset or resource upon which that community relies. It is tempting to chalk this up to an inherent legal tension between a fiduciary and an indirect beneficiary or non-beneficiary such as a local government.

In truth, however, that tension is the same whether the land or asset is owned by a private party or by a state or federal agency. In both cases the disposition and use of the land is, to a great extent, controlled by valid local land use plans. Also, in both cases the developer or public landowner must enter into a partnership with local government in order to achieve their respective goals. The partnership, as with all partnerships, contains many tensions and will undergo transformation over time, but it is a mandatory partnership. The partnership should be structured to accomplish the goals of both parties: the developer or public landowner must be treated fairly and be able to receive fair market value for the asset should she want to dispose of it; and local governments and communities must be able to influence the project for aesthetic reasons, infrastructure issues, traffic and pollution concerns, and cultural and neighborhood character issues.

It is incorrect to say that there is a difference between a developer and the State Land Board in the context of extracting value from assets adjacent to or inside a community. The Land Board has a fiduciary obligation to generate income for its beneficiaries and a developer or private landowner has a similar obligation to his or her family, stockholders, and

22. *See, e.g.*, E. Creek Ranch v. Brotman, 998 P.2d 46 (Colo. Ct. App. 1999) *rev'd* Brotman v. E. Creek Ranch, 31 P.3d 886 (Colo. 2001). However, at press time, the State Supreme Court ruled that the plaintiff, an owner of the Denver Post and neighbor of the subject parcel did not have standing. *Brotman*, 31 P.3d. 886. The Govenor has indicated that he will use a little known statute to condemn the property into general government ownership.

partners. More and more, developers are engaged with local governments because they find it easier to work in cooperation with, rather than in opposition to, local government land use authority.

The true tension arises because of the Board's status as a public agency and arm of state government. The Board is subject to "good government" laws that statutorily require open meetings and open records.[23] In contrast, private real estate developers do not have to divulge any of their planning activities to the public, interested parties, or competitors. Additionally, the Board's budget is set by the Legislature.[24] Statutes and custom require annual reports to the legislature about Board activities.[25] Again, private landowners may make intelligent business decisions without legislative oversight or approval of those decisions.

If the Board begins to perceive itself as a private landowner, it runs the risk of violating principles of open government and public accountability. If the Board's self-perception shifts to a classical "public" landowner, it may not be fulfilling its responsibility to the trust beneficiaries. The spectrum of land ownership in the United States runs from a private land developer on one end to the National Park Service on the other. By trying to find the fine line between its two roles, the Board inevitably fails to meet expectations of either the public or the beneficiaries, or both. But, by law, the Board must satisfy both of these constituencies.[26] This seemingly impossible problem caused the pre-1996 Board to overemphasize its developer role to the exclusion of good government. The 1996 constitutional amendment attempted to correct this imbalance.[27] The next several sections of this article attempt to explore that amendment, its structure, and possibilities for dealing with the tension between the Board's two roles.

II. AMENDMENT 16 TO THE COLORADO CONSTITUTION

A. *Campaign to Save Our Trust Land*

Governor Romer asked his staff and the Executive Director of the Department of Natural Resources, Jim Lochhead, to come up with a solution for the above-mentioned woes. Amendment 16 was born. The campaign to Save Our Trust Land won a difficult campaign by a slim margin.[28] The likely reasons for the slim win are that 1) this was a very complicated constitutional amendment and 2) there were a great many misperceptions about what it would and would not do. In the next several

23. COLO. REV. STAT. §§ 24-6-402, 24-72-101 et seq. (2001).
24. COLO. CONST. art. IX, § 9(4).
25. *See, e.g.*, COLO. REV. STAT. § 36-1-148(4) (2001).
26. COLO. CONST. art IX § 10(1).
27. Amendment 16, *supra* note 1.
28. *See* Colo. Dept. of State, Elections Center, http://www.sos.state.co.us/pubs/elections/main.htm.

sections, I will attempt to outline the fundamental changes that Amendment 16 made, the misperceptions during the campaigns that continue today about Amendment 16, and finally what Amendment 16 contributes to the debate about land management and land use in the West.

B. *Overriding Requirements for Management of State Trust Lands*

The Colorado Constitution designates the State Land Board as the entity responsible for receiving all lands granted to the state by the federal government.[29] The Constitution provides that the Board

> shall serve as the trustee for the lands granted to the state in public trust by the federal government, lands acquired in lieu thereof, and additional lands held by the board in public trust. It shall have the duty to manage, control, and dispose of such lands in accordance with the purposes for which said grants of land were made and section 10 of this article IX . . . .[30]

Consistent with the Colorado Enabling Act under which the federal government granted lands to Colorado at statehood,[31] the Colorado Constitution and the statutory direction for these and other lands granted prior to statehood, the State Land Board serves as trustee for eight separate land trusts with specific beneficiaries as follows:

School Trust: section 16 and 36 in every township "for the support of common schools" with the proceeds of any sales of such lands deposited into "a permanent school fund, the interest of which [must] be expended in the support of common schools."[32] Current acres: 2,640,368 surface and mineral; 1,007,385 mineral only.[33] The State Treasurer manages money currently amounting to approximately $299 million from the sale of land and from royalties from mineral development.[34]

Public Building Trust: "[F]ifty entire sections of the unappropriated public lands, . . . selected and located by . . . the legislature for the purpose of erecting public buildings at the capital . . . for legislative and judicial purposes."[35] Current acres: 935 surface and mineral; 12 mineral only.[36]

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29. COLO. CONST. art IX § 9.

30. *Id.*

31. ENABLING ACT, *supra* note 3, § 1.

32. *Id. at* §§ 7, 14.

33. COLO. STATE LAND BD., STRATEGIC PLAN (June 1998), *available at* http://trustlands.state.co.us/strategic.html (hereinafter "STRATEGIC PLAN").

34. COLO. STATE LAND BD., 2000 ANNUAL REPORT, available at http://trustlands.state.co.us/2000%20Annual%20Report/charts_graphs.htm (hereinafter "2000 ANNUAL REPORT")

35. ENABLING ACT, *supra* note 3, § 8.

36. Interview with Margret Goebel, Land Record Custodian, Colorado State Land Board, in Denver, Colo. (Jan. 20, 1998).

Penitentiary Trust: "[F]ifty other entire sections of land . . . selected and located [by the legislature], . . . for the purpose of erecting a suitable building for a penitentiary or state prison."[37] Current acres: 7,805 surface and mineral; 1,548 mineral only.[38]

University of Colorado Trust: Seventy-two sections of land, selected and located by the legislature, to "be set apart and reserved for the use and support of a state university."[39] Current acres: 3,681 surface and mineral; 8,023 mineral only.[40]

Saline Trust: "[A]ll salt springs . . . not exceeding twelve in number, with six sections of land adjoining, and as contiguous as may be to each, . . . selected by the governor" and not vested in any individual(s), for use by the state, the cash receipts from which "shall be credited to the parks and outdoor recreation cash fund."[41] Current acres: 16,583 surface and mineral; 457 mineral only.[42]

Internal Improvements Trust: Five percent "of the proceeds of the sales of agricultural public lands [in Colorado sold by the federal government] shall be paid to [Colorado] for the purpose of making . . . internal improvements," the cash receipts from which "shall be credited to the parks and outdoor recreation cash fund."[43] Current acres: 130,019 surface and mineral; 85,627 mineral only.[44]

Colorado State University Trust: Congressional grant of 1862, "[a]n Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts,"[45] "for the use and benefit of Colorado state university."[46] Current acres: 20,299 surface and mineral; 22,383 mineral only.[47]

Hesperus Trust: "[T]he property formerly known as the 'Fort Lewis school' granted . . . to . . . Colorado [in 1910], as modified by an act of congress [in 1916] . . . The income from [both the land and mineral rights] shall be appropriated by the general assembly and used by the state board of agriculture first for tuition waivers at Fort Lewis college for qualified Indian pupils . . ." with any remaining amount to be appro-

37. ENABLING ACT, *supra* note 3, § 9.
38. STRATEGIC PLAN, *supra* note 33.
39. ENABLING ACT, *supra* note 3, § 10.
40. STRATEGIC PLAN, *supra* note 33.
41. ENABLING ACT, *supra* note 3, § 11; COLO. REV. STAT. § 33-10-11 (2001).
42. STRATEGIC PLAN, *supra* note 33.
43. ENABLING ACT, *supra* note 3, § 12; COLO. REV. STAT. § 33-10-11 (2001).
44. STRATEGIC PLAN, *supra* note 33.
45. COLO. REV. STAT. § 23-32-101 (2001).
46. *Id.* § 23-32-102.
47. STRATEGIC PLAN, *supra* note 33.

priated by the board of agriculture subject to legislative approval.[48] Current acres: 6,270 surface and mineral.[49]

The Colorado State Forest in Jackson County is the result of a land trade with the federal government made during the early 1930s.[50] Each of the above trusts, except Hesperus, holds an undivided percentage interest in the whole forest acreage of approximately 71,000 acres.[51] Additionally, a separate statute imposes some additional conditions on management or disposition of the forest.[52] Finally, Jackson County School District receives a yearly portion of the income generated from activities on the forest.[53]

The Constitution also authorizes the board to "undertake non-simultaneous exchanges of land" provided that the purchase of lands to complete the exchange is finished within two years of the initial sale or disposition.[54]

With specific reference to state school lands, the Constitution now provides that these lands are an "endowment of land assets."[55] The section further states that this endowment is to be "held in a perpetual, intergenerational public trust for the support of public schools, which should not be significantly diminished."[56] It further provides "that the disposition and use of [state school] lands should therefore benefit public schools including local school districts."[57] Through this section, the people of Colorado have expressed their will that the state lands should be managed on a long-term basis for current and future generations.

With respect to all state trust lands, both those that are designated as state school lands and those that are managed for other, smaller trusts, the Constitution states "that the economic productivity of [these lands] is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space and wildlife habitat" of these lands now and for future generations.[58] This provision recognizes that taking good care of the land enhances its economic value.

The fiduciary responsibility of the Board in its role as trustee is further defined as producing "reasonable and consistent income over

48. COLO. REV. STAT. §§ 23-30-114, 115 (2001).
49. STRATEGIC PLAN, *supra* note 33.
50. *Id.*
51. *Id.*
52. COLO. REV. STAT. § 36-7-201 (2001).
53. COLO. REV. STAT. § 30-29-101 (2001).
54. COLO. CONST. art. IX, § 9(7).
55. *Id.* § 10.
56. *Id.*
57. *Id.*
58. *Id.*

time."[59] This provision proves that it is prudent for the board to develop a long-term strategy for managing its trust assets. Although the Board may be required to forego immediate short-term income opportunities that might compromise future income streams and enhanced future value, the provision will provide some level of certainty to trust beneficiaries that they will receive a reliable level of income into the future.

C. *The Stewardship Trust*

The new Colorado Constitution directs the Land Board to establish and maintain a long-term Stewardship Trust of 295,000 to 300,000 acres.[60] The Stewardship Trust builds upon the overall direction outlined above. By recognizing the perpetual, intergenerational nature of the trust, the constitutional provision acknowledges that immediate development may not always be appropriate for all lands. In addition, the Constitution recognizes that it is prudent to set aside a portion of the state trust lands, in this case, about 10 percent for the future. This is similar to what most individuals do in establishing a savings or retirement account or in estate planning. The Stewardship Trust represents a judgment by the people of Colorado that certain lands may be more valuable in the future through appreciation, if both the land and the natural resources on the land are well maintained for future use rather than sold immediately for short-term gain.

In order for land to be designated into the Stewardship Trust, the Board must determine "through a statewide public nomination process" that such land is "valuable primarily to preserve long-term benefits and returns to the state."[61] The amendment further provides that lands within the Stewardship Trust will be "managed to maximize options for continued stewardship, public use, or further disposition" by protecting and enhancing "the beauty, natural values, open space, and wildlife habitat" on these lands.[62]

The Stewardship Trust operates within the general mandate to "produce reasonable and consistent income [for trust beneficiaries] over time."[63] Therefore, the Trust is set up to preserve a valuable land base for the future.[64] The Trust, however, is not intended to set land aside to preserve it forever in a pristine condition nor solely for open space or public access uses.[65] The land in the Stewardship Trust will likely still generate income, including existing uses such as grazing, crop production and

59. COLO. CONST. art. IX, § 10.
60. *Id.* § 10(1)(b)(I).
61. *Id.*
62. *Id.*
63. COLO. CONST. art. IX, § 10(1).
64. *See id.* § 10(1)(b).
65. *See id.*

mineral development, to the extent that such uses can be managed in ways that are compatible with long-term protection of the land's natural resource values. In fact, many uses of state trust land, such as sound agriculture or wildlife recreation provided through the State Land Board's public access program with the Division of Wildlife, seem compatible with Stewardship Trust management goals.

D. *Misperceptions*

In political campaigns, the saying goes, there are a few rare moments when the truth actually slips out. Amendment 16 should have been an exception to that piece of political folk wisdom. There should not have been any controversy about it. There was no effect on any existing contracts that the Land Board had issued, no rates were raised for any uses on any Land Board lands, and there were no specific changes in use for state lands.[66] So, the question remains. Why was there a close vote, a great deal of controversy, and a campaign fraught with inaccuracy?

The campaigns for and against Amendment 16 tended to fix a number of misperceptions in the minds of voters, lessees and public officials. The opponents of the amendment characterized it as: immediate free public access to all state trust lands, instant and permanent open space designation for all 3 million acres of trust land, a revocation of all existing leases on state trust lands—and a plunge of revenues from $24 million to $0, forcing schoolchildren to do their homework on slates by the light of coal oil lanterns.[67] Amendment 16 backers, especially at the grassroots level, tended to echo the first two of those scenarios—free public access and permanent open space designation for all trust lands.[68] Governor Romer, who was the main backer, fundraiser and cheerleader for Amendment 16, was quite painstaking in his explanation of the amendment,[69] but his voice was drowned out by the need for the proponents' campaign to convince the state's voters that Amendment 16 was a good idea. The public debate had very little to do with the reality of Amendment 16. This brings me to the heart of this article.

E. *Legal Tensions Within the Amendment*

It is apparent from the language of the Constitution that the drafters of Amendment 16 were concerned with addressing many of the issues brought up in Section 2 above. Additionally, they drafted an amendment that comes close to the line of identifying other values and other benefi-

66. *See* Amendment 16, *supra* note 1.

67. Chris Roberts, *Amendment 16 Would Change School Trust Land Management*, BOULDER DAILY CAMERA, Oct. 14, 1996, at 1C.

68. *See generally, Letters to the Post*, DENV. POST, Feb. 19, 1996.

69. Mark Louden, *Report Card: Land Board Needs Reform*, STEAMBOAT PILOT, May 16, 1996.

ciaries than those enumerated by the Enabling Act.[70] Judge Ebel in his legal opinion regarding the validity of Amendment 16 stated:

> [i]n enacting Amendment 16, Colorado's voters sought to rewrite the management principles underlying their state's school land trust, shifting the state away from its prior focus on short-term profit maximization toward a more sustainable approach focusing on the long-term yields of the trust lands. We cannot say as a matter of law that this change in management philosophy necessarily will lead to a breach of Colorado's solemn fiduciary obligations arising out of the federal trust enacted by the Colorado Enabling Act.[71]

Additionally, the court found that reasonable and consistent income over time is an appropriate way to define the goals of the State Land Board.[72] The Attorney General's office in their briefs to the court made the case that the new language of the Constitution is essentially an equation: sound stewardship equals economic productivity:[73]

> Rather than reading this provision [Section 10(1)(C)] as charging the exclusive purpose of the school lands trust, as the plaintiffs argue, we believe that the 'sound stewardship' principle merely announces a new management approach for the land trust. The trust obligation, after all, is unlimited in time and a long-range vision of how best to preserve the value and productivity of the trust assets may very well include attention to preserving the beauty and natural values of the property.[74]

What these statements from the legal authorities do not take into account is that the total trust asset of 3 million acres is likely to be valued between $3 and $5 billion, given land values in Colorado.[75] The annual return in income, not including appreciation, is approximately $20 million, thus the return on investment on an annual basis, again not including appreciation, is between .4 and .66 percent.[76] Such a calculus almost inevitably leads to a conclusion in many peoples' minds that a better disposition of State trust lands would be their immediate sale and reinvestment into higher yielding investments such as stocks, bonds, other higher

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70. Sen. Wayne Allard and Reps. Mark Udall and Scott McInnis have proposed bills which change the statehood enabling act to align it with the Colorado Constitution. H.R. 2584, 107th Cong.; S. 1146, 10th Cong. These bills, should they pass, will go a long way toward eliminating some of the tensions internal to the land board.

71. Branson Sch. Dist. v. Romer, 161 F.3d. 619, 643 (10th Cir. 1998) (hereinafter "*Branson II*").

72. *Branson II*, 161 F.3d at 640.

73. Appellee's Answer Brief at 31-34, *Branson II* (No. 96-B-2969).

74. *Branson II*, 161 F.3d at 638.

75. Interview with John Brejcha, Deputy Director of Colorado State Land Board, January 20, 1998.

76. *Id.*

producing land assets. This is where the most cognitive dissonance occurs with respect to the land.

For a number of reasons, previous Land Boards have not been inclined to sell land over the last 120 years. When confronted with the rate of return on an asset so absurdly small, the previous and current Boards both point to a set of considerations that, while not necessarily economically quantifiable, certainly have an impact on the economics of such a decision. First, the lessees of the many state lands are well organized and have considerable political clout. The Legislature controls the Board's annual budget and has established procedures that the Board must follow.[77] These two factors taken together lead to an obvious internal problem should such a "sell it all" scheme ever be attempted. Secondly, the State Land Board has never been a true land management agency in the sense of actively managing its lands. It has been a lease management agency that relies upon lessees to conduct management activities such as fencing, weed control, trespass control and other improvements to the property.[78] Related to this is long-term reliance upon the ability to use state lands as lessees use their own private lands that are adjacent to state lands. Over 120 years a system has developed without challenge that has created interdependency between the State Land Board and its lessees. A destruction of this partnership would require enormous increases in staff at the Land Board to manage the land actively.

III. AMENDMENT 16'S ROLE IN CONSERVATION AND PRESERVATION OF OPEN SPACE, WILDLIFE HABITAT, NATURAL VALUES AND NATURAL BEAUTY

Each of the changes that Amendment 16 made has the potential to positively impact natural resource values on State Trust land in Colorado. Amendment 16 changed the structure of the State Land Board, added a set of provisions benefiting public schools, gave land banking authority to the Board, changed its economic mandate, created a Stewardship Trust, and created a new program to encourage good stewardship on State Trust lands.[79] I'd like to discuss each of these changes, starting with the changes that might not appear to have an obvious impact on the preservation and conservation of natural resource values. By natural resource values, I mean the long-term health of the State Trust lands,

77. *See* COLO. REV. STAT. § 36-101 et seq. (2001).

78. *See, e.g.*, COLO. REV. STAT. §§ CRS 35-5.5-110 (2001)(state agencies must control noxious weeds on lands under their jurisdictions) and 35-5-112 (2001)(state agencies must control pests and noxious weeds on lands under their jurisdictions); Board of Land Commissioners, Policy 2000-1 (June 16, 2000), *available at* http://trustlands.state.co.us/policies/policy_weed_mgt.htm ("[L]essees will be directed to aggressively control noxious weeds on all state trust lands" and "Staff will oversee weed control efforts and educate lessees about their responsibilities to prevent and manage noxious weed problems, and the types of assistance that are available from the SLB and others.").

79. *See* Amendment 16, *supra* note 1; *see also* COLO. CONST. art. IX, §§ 9, 10.

which is indicated by its wildlife habitat, open space, beauty and other natural values. Amendment 16 equates this measurement of land health with the ability of that land to generate a reasonable income for beneficiaries in perpetuity.[80]

A. *Structure*

The structure of the State Land Board changed from three full-time paid "manager" commissioners to a five-person volunteer Board.[81] The problem with the previous structure was that the Board members were project managers first and policy experts second. As project managers, they tended to get vested in their projects. Each Board member would have his or her own portfolio, and the other two tended to defer to that one person as a professional courtesy when the time came for the Board to act in its fiduciary role as an adjudicatory body. The result was no independent review of deals that were brought to the whole Board by one of their co-Board members. This collegial deference may have overcome the fiduciary responsibility in a number of cases. This decision-making dynamic overstressed land sales and development schemes, as developers would shop their ideas to each Commissioner until they found a taker or patron who could shepherd them through the Board process. And Commissioners, acting as project managers, tended to measure their success by the number of deals done, rather than by the independent judgment they might exercise as a deliberative fiduciary body.

Amendment 16's solution to this difficulty was a five-person board that meets once a month to approve larger projects and to set the bounds within which staff may act and create policies, rules and regulations.[82] The new organization functions like a Board of Directors of a corporation would. The new organization is one where the staff presents information to the Board and makes a recommendation based on that information, where proponents and opponents of a particular deal have a chance to speak, and where the Board acts based on that record.[83] Plans to cut up rural landscapes to the benefit of the developers but not necessarily to the benefit of the school children, take a backseat when a sophisticated policy board, without a vested interest in the project, reviews those schemes before the Land Board staff implements them.

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80. *Id.*

81. COLO. CONST. art. IX, § 9(1).

82. *Id.* at § 9(1), (4).

83. Colo. State Land Bd., Board Policy No. 00-5, Policy Concerning Appeal of Decisions and Seeking Redress from the Board, *available at* http://www.trustlands.state.co.us/policies/policy_redress.htm. *See also* COLO. REV. STAT. § 24-6-401 et seq. (2001).

B. *Education*

A number of provisions in Amendment 16 benefit education directly.[84] One problem local school districts faced under the old Board was that they were not able to use state lands either for outdoor education or for siting schools.[85] The old Land Board thought that to favor one district by allowing "free" activities on state land would diminish the income returns to all the districts. New provisions in the law allow the Land Board to sell a site to a school district for the purpose of placing a school on it at no more than fair market value and in a cooperative and collaborative process.[86] Additionally, the Constitution now provides specifically for the Land Board to collaborate in outdoor education activities with local school districts to provide them access to conduct their educational activities on Land Board land.[87] These new provisions encourage the Board to enter into educational siting and use agreements on lands under their control, which will enrich education as well as provide an additional use that relies on and pays for those natural values. This double benefit is crucial to the Board's ongoing compliance with its Enabling Act and Constitutional mandates. Although Amendment 16 changed some of the subsidiary considerations and part of the underlying philosophy of the Board, it must still look at every transaction to ensure that it is in the best interest (both directly, through monetary return, and indirectly, through valuable use) of the beneficiaries.[88]

C. *Non-Simultaneous Exchanges*

The Constitution now grants the Land Board authority to do non-simultaneous land exchanges, or "land banking."[89] The old Board assumed that it had this authority, but this assumption was never legally tested or proven. It typically tried to develop valuable mountain lands in order to purchase higher yielding assets, such as parking lots. The new Board does not appear to be moving quickly to liquidate it's most valuable holdings; rather, it is seeking to consolidate land holdings to increase both the yield on those lands and the efficiency of management.[90] Using the tool of non-simultaneous land exchanges, this new Board will be able to create large, economically viable blocks of land upon which multiple uses can occur and a greater revenue stream can emanate over time.[91] This consolidation also offers obvious advantages to environ-

84. *See* COLO. CONST. art. IX, § 10(1)(a), (1)(d), (1)(e).
85. *Amendment 16 Enhances Public-Lands Stewardship*, DAILY SENTINEL, Oct. 14, 1996.
86. COLO. CONST. art. IX, § 10 (1)(e).
87. *Id.* § 1(d).
88. *See* COLO. REV. STAT. § 36-1-101.5(6) (2001).
89. COLO. CONST. art. IX, § 9 (7).
90. Mark Louden, *Report Card: Land Board Needs Reform*, DENV. POST, May 16, 1996.
91. *Id.*

mental health, since large blocks of land can sustain healthier wildlife and plant populations and provide more open space.

Additionally, the Board's area of expertise has historically been agriculture.[92] It would make little sense to disregard this expertise; therefore, the new Board has indicated an interest in purchasing working ranches and leasing them to operators.[93] The return on their investment for intact ranches may be higher than the return for scattered parcels. In addition, it believes that this will accomplish the other objectives of the Constitution: community stability, sound stewardship, public use and protection of the beauty, natural values, and open space, and wildlife habitat.[94]

D. *Economics*

Amendment 16 also changes the new Board's economic mandate from a directive to obtain the "maximum possible amount therefore" to a directive to achieve "reasonable and consistent income [from the Land Board lands] over time."[95] This may not appear to be a legally significant change, because under trust law, the classic "reasonable person" standards govern the Board. However, the practical effect of the change is more dramatic and illustrates the power of the predatory nature of Amendment 16 changes. The old Board appeared to feel the mandate to maximize revenue required it to consider selling land to whoever walked in the door at any time. It felt that maximizing revenue meant achieving a market rate whenever someone offered to buy that land. The new Board seems to have taken notice that land appreciates over time dramatically, and has always been a good, long-term investment. The new Board has taken the view that achieving reasonable and consistent revenue over time allows it to care for the health of the land, and, in doing so, increase its economic productivity and value over time.[96] This, combined with its ability to do land banking, positions the Board to be the owner of large tracts of land containing high natural values while also producing better-than-historic levels of income.

External forces drove the old Board's actions. Its long-range plan seemed to consist of a strategy of "let's see how much more we can get above this guy's initial offer."[97] The Board's recent past president, Tom Swanson, likened the old Board to the proprietor of a candy store open from 9-5; the busy hours are after school when the kids come in and say,

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92. *Amendment 16 Enhances Public-Lands Stewardship*, DAILY SENTINEL, Oct. 14, 1996.
93. *Id.*
94. *Id.*
95. *A Yes on 16 Saves Trust Lands*, DAILY CAMERA; COLO. CONST. art. IX, § 10(1).
96. *A Yes on 16 Saves Trust Lands*, DAILY CAMERA.
97. *Preserve Colorado's lands*, ROCKY MOUNTAIN NEWS, Aug. 16, 1996 (stating that the old land board had to "sell to the highest bidder.").

"I'll have one of those, 2 of these and 7 of them."[98] Partly because of the change in mandate language and partly because the new appointees come from sophisticated financial backgrounds, the new Board now views itself as investment managers with the duty to manage for the extremely long term. It must manage values that may not return economically today, but may in the next 200 to 500 years. The Board can now be proactive rather than reactive in deciding their priorities. This takes the pressure to do transactions "on demand" off the Board and also allows it to postpone and preserve its options on specific properties while managing the whole portfolio of assets for reasonably increasing revenue.

E. *Stewardship*

Another Amendment 16 provision requires the Board to modify its leasing structure to give incentives to persons who conduct their activities on Land Board land with great environmental sensitivity.[99] The program, Stewardship Incentives Program, aims to sustain and increase the environmental health and natural values present on Land Board land.[100] Until 1996, if a lessee was careful about his grazing practices and conducted his operation in a way which improved and sustained the health of Land Board land and its carrying capacity for cattle grazing, the old Board responding by looking at the land as though it had increased in value, and rent should be raised. In effect, the old Board punished good stewards of State Land Board land by raising their rent. This created a disincentive to make improvements to leased land, or to treat it well. Amendment 16 regards land management as an explicit equation: Sound stewardship equals economic productivity.[101] A corollary to this equation is that sound stewardship also improves natural values on trust lands.

Finally, the most highly touted new Constitutional provision is Amendment 16's Stewardship Trust.[102] Amendment 16 directs the Land Board to place 300,000 acres of land into a special Stewardship Trust which it will manage for long-term productivity and to improve and enhance wildlife habitat, natural beauty, natural values and open space.[103] This provision anticipates continuing existing, non-conflicting uses on Land Board land while engaging in more aggressive management to improve and manage that land's health.[104] Essentially, the Stewardship

98. Interview with Tom Swanson, former President, Colorado State Board of Land Commissioners, Evergreen, Co., January 20, 1998.

99. COLO. CONST. art. IX, § 10(1)(b)(II).

100. *A Yes Vote Benefits Children, Open Space*, DENV. POST, Nov. 3, 1996.

101. *Id.*

102. *Id.*

103. COLO. CONST. art. IX, § 10(1)(b)(I).

104. *A Yes Vote Benefits Children, Open Space*, DENV. POST, Nov. 3, 1996.

Trust recognizes that state land has high natural values and management needs to enhance these values.[105]

F. *Public Process*

From the above discussion about the specific incidences and transactions that motivated Amendment 16's proponents, the reader can infer that public relations was an organizationally disregarded area for the former Board. Amendment 16 and its accompanying legislation were specifically designed to open up the process by which the State Land Board makes its decisions. The old Board, in addition to receiving ex-parte comments on a daily basis, conducted its monthly meetings in a very peculiar way. On the day preceding the official meeting, the old Board conducted what it called a workshop. The workshop was actually an unrecorded, dress rehearsal for the meeting the following day. All the analysis, weighing and balancing the issues, and other relevant information was presented to the Board by staff during the workshop. The Board typically discussed issues and proposals at length and then held a shorter, more stilted, discussion during the public meeting. Thus, those not in attendance at the workshop never fully knew on what the Board was basing its decisions, nor were they allowed to interact with the Board during the true decision-making process.

An excellent example of how open public process can help to preserve open space and wildlife was the Seven Utes issue mentioned above. The Board was rapidly moving towards creating a new ski area and large base area development with very little public input. When light was finally shown on the process, and the public was notified, over 500 people showed up at the public meeting in Fort Collins to debate the merits of a ski area proposal and the Board reversed its course.[106]

Vigorous public debate is now used to define the contours of the Board's public issues. Even though the Board must consider, first and foremost, the beneficiaries of the trust, those beneficiaries will benefit if the public is educated about the Board's responsibilities and can focus on helping the Board achieve those responsibilities while purely public values such as open space, wildlife habitat, beauty and other natural values are advanced.

G. *Tensions Between Amendment 16's New Programs and the Fiduciary Role of the Board*

The plaintiffs in the case against Amendment 16 asserted that the new structure of the Land Board, five volunteer commissioners, was not suf-

105. *Preserve Colorado's Lands*, ROCKY MOUNTAIN NEWS, Aug. 16, 1996.

106. Interview with Doug Young, former policy advisor to Governor Roy Romer, in Boulder, Colo. (Oct. 9, 2001).

ficient to protect the interests of the beneficiaries.[107] They asserted this because the Amendment directed that one of each of the commissioners have expertise in certain areas of importance to the Board.[108] The opponents to Amendment 16 made the claim that those areas of expertise essentially gave the constituents/customers and groups a seat on the Board with which to protect those constituent group's interests.[109] Judge Babcock was not convinced by this argument because the language of Amendment 16 states that a Board member is merely to have expertise in a particular area, and not to represent the constituent group interests related to those areas.[110]

The use and sale of lands to school districts for educational purposes, provided for in the Amendment, is a new program that could cause legal tension. Curiously, this program revisits a long-ago arrangement in which the Land Board gave land for free to local school districts so that they might place a school on the land. Most of the historic country schoolhouses in Colorado may still be found on the corners of a section 16 or 36. The new constitutional directive mandates that the Board allow school districts to purchase (at no more than fair market value) lands that they require for educational purposes.[111] Additionally it requires the Land Board to provide outdoor education opportunities to local schools.[112] The tension here is that the State equalization formulas are designed to correct imbalances between districts with high assets and income and districts that have low assets and low income from year to year.[113] It would be very difficult to add the value of a school district's use of State Land Board land into that equalization formula. Additionally, many school districts do not have Land Board lands within their district at all and some have none that they could choose to take advantage of under these programs. So the application of this program will almost certainly be disparate across the school districts. How this is squared with the State's funding scheme remains to be seen.[114] Additionally, outside the scope of the funding scheme, traditional trust law would not have a fiduciary trustee favor one set of beneficiaries over another. Perhaps one way of

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107. *Branson II* at 631.

108. *Branson II* at 642; Branson Sch. Dist. v. Romer, 958 F.Supp. 1501, 1518 (D. Colo. 1997) (hereinafter "*Branson I*").

109. *Branson II* at 642; *Branson I.* at 1518.

110. *Branson I* at 1518.

111. COLO. CONST. art. X, § 10(1)(e).

112. COLO. CONST. art. X, § 10(1)(d).

113. *See* COLO. REV. STAT. § 22-54-102 (2001).

114. *Branson I* at 1522.

> Plaintiffs argue that the phrase 'which shall not exceed the appraised fair market value' should be enjoined because the Board, as trustee, should never accept any less than fair market value. First, I am not convinced that schools, as beneficiaries of the trust, cannot be given a better price than other buyers or lessees of school lands. I need not decide that question, however, as nothing in this section requires the Board to accept any less than the most money it determines it can garner for a particular tract of school lands.

calming this tension is to make the program available to all and to work equally with all those who choose to avail themselves of it.

The Stewardship Incentives program offers another set of quandaries for the new commissioners. Currently, the fee schedule for grazing lessees is set by multiplying the carrying capacity of a piece of land in numbers of cattle by the regional average of the price of an animal unit months as determined by a survey conducted by the State Department of Agriculture.[115] Then the Board discounts this rate by 35% as a credit for the cost of management of the land.[116] Management activities are to include weed abatement, fencing, water development, and any other improvements needed to make the parcel productive.[117] The Constitution now directs the Board to create a Stewardship Incentives Program that will reward agricultural lessees for good stewardship by structuring the lease and changing terms such as rate, length and other conditions to encourage continued high levels of stewardship on state trust land.[118] The Board's lessees have requested a rate structure that would give them more of a management credit for higher levels of stewardship on state trust land. Many worry that this is essentially giving something away for nothing and therefore violates the fiduciary responsibility to generate income. On the other hand, the Board does not currently differentiate between good and bad stewards of its land. In fact, the Board penalizes good stewards for their stewardship when the carrying capacity of their land increases due to good stewardship by then charging the stewards a higher rate.

Amendment 16, while it solves many problems of the Board, does not dismiss all of the tensions that are inherent in land management. The provisions of Amendment 16 were written in a way to push the envelope on state trust land fiduciary law. As written, and on their face, they appear to be constitutional and have been upheld as such by the Federal District Court and the U.S. Circuit Court of Appeals.[119] Their application will prove to be the true test of Amendment 16's constitutionality and its practicality.

IV. IMPACTS ON MANAGING TRUST LANDS

Through the above examination of some of the problems that gave rise to the solution embedded in Amendment 16, the examination of Amendment 16 itself, and the explanation of Amendment 16's role in

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115. *See* Colo. State Land Bd., *News Release: Land Board to Consider Grazing Rate Increases*, Nov. 9, 1999 *available at* http://www.dnr.state.co.us/cdnr_news/land/19991110100l3.html.

116. *Id.*

117. Interview with John Brejcha, Deputy Director, Colorado State Land Board, in Denver, Colo. (Jan. 20, 1998).

118. COLO. CONST. art. X, § 10(1)(b)(I).

119. *See generally Branson I*; *Branson II*.

conservation and preservation, it may be possible to speculate on some of the impacts that Amendment 16 may have on the practice of trust land management. Possibly the most productive way of doing this would be to examine several of the projects the new Board has undertaken in the 4 years since the passage of Amendment 16. From these projects, one can discern an ethical and practical sea change in the way that the Board does its work. The methodologies that will be discussed in this section may be applicable to other private, public and trust land management practices across the west. It would be presumptuous to say that these methodologies are not currently in use in land use and land management in various ways in various agencies across the west; specifically, one can look at the Resource Advisory Council process and various ecosystem and watershed scale management partnerships among federal, state and local governments. However, the methodologies may prove useful to other agencies and private individuals as people in the west struggle to come to grips with issues such as sprawl, air and water pollution, disappearing agricultural lands, and decreasing wildlife habitat.

This section will review three specific cases on which the Board is currently working, discuss the philosophy of the Board in each of these cases, reveal how that philosophy is borne out in practice and predict what the result of each of these issues could be for both public values as well as the trusts' interest. The three areas of initiative are: the Colorado State Forest planning process as it unfolds after the Seven Utes controversy, the Emerald Mountain working group proposal to the Board, and the Chico Basin Regional Ecosystem management process.

A. *Colorado State Forest*

1. Background

The Colorado State Forest, created in 1936 by act of the state legislature,[120] is about 71,000 acres of land on the east side of North Park in Jackson County, Colorado.[121] It has received heavy logging pressure over the last fifty years, at one time being the location of the largest logging operation in the state.[122] Since the late 1950s, the State Forest has been managed primarily for sustainable timber and grazing.[123] Since the improvement of Highway 14 across Cameron Pass from a seasonal dirt road to a year-round paved road in the 1970s, North Park and especially the Colorado State Forest have become destinations for recreational tourism.

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120. COLO. REV. STAT. § 36-7-201 (2001).

121. COLO. STATE LAND BD., COLORADO STATE FOREST INTEGRATED MANAGEMENT PLAN 1 (2001), *available at* http://trustlands.state.co.us/State%20Forest%20Plan/state_forest_plan_intro.htm (hereinafter "INTEGRATED MANAGEMENT PLAN").

122. Interview with John Twitchell, District Forester, Colorado State Forest Service, in Gould, Colo. (Jan. 24, 1998).

123. *Id.*

Since the mid-1980s, the Land Board has contracted with Colorado State Parks to manage recreational activity on the State Forest. Currently loggers, ranchers, hunters, mountain bikers, hikers, fishermen, cross-country skiers, and wildlife enthusiasts use the State Forest.

The State Parks and the Colorado State Forest Service jointly manage the State Forest.[124] Additionally, the Land Board's Northwest District Manager closely monitors activities on the forest. Following the Seven Utes controversy described earlier, the Board created the Colorado State Forest Advisory Committee which is comprised of twelve members, one each from the four interested agencies (State Parks, Colorado Forest Service, State Land Board and the Division of Wildlife) and eight additional members from the community and users of the State Forest.[125]

2. Board Philosophy and Direction

The Board directed the State Forest Advisory Committee to work with all of the stakeholders and interested parties in the State Forest to come up with a plan that would give some certainty to those parties about future activities and longer range plans for the State Forest. Additionally, the Committee was charged with determining the appropriate and sustainable level of revenue that the State Forest could generate for the Board's trust beneficiaries. In essence, the Board recognized that the State Forest was a unique large landscape for which there existed a great deal of experience and expertise that had not been tapped during previous planning processes for the parcel. The Board created a collaborative decision-making group comprised of parties with high levels of experience and expertise on the State Forest and directed them to come up with a plan using that collaborative process. In 1997, the State Forest Advisory Committee, using the services of a consultant, embarked on a process of creating a master plan for the State Forest.

3. Result and Lessons

By creating a collaborative atmosphere and placing trust in a set of experts and local stakeholders, the State Land Board has become the recipient of a highly detailed, extremely responsible long-range management plan for the Colorado State Forest.[126] This success came out of the ashes of a breakdown of public process and rational discourse in the Seven Utes case. The contrast between the top-down, non-consultative, edict-style of management that characterized the Seven Utes controversy and the bottom-up, collaborative, locally-invested process that the Advisory Committee uses cannot be more stark. On the one hand, the result was a high-profile public failure for an embattled board that further de-

124. INTEGRATED MANAGEMENT PLAN, *supra* note 121.

125. Colo. State Land Bd., Colo. State Forest Advisory Comm. Charter (Apr. 2, 1996).

126. *See* INTEGRATED MANAGEMENT PLAN, *supra* note 121.

creased its credibility and engendered a radical change to its operation. In the other case, the result so far has been a workable, sustainable, long-range multiple-use plan with buy-in from all interested parties, both into the result and into the process that generated that result. The Colorado State Forest Advisory Committee process may become a model to be duplicated in other large landscape management decisions in the State Trust lands context. It must work hard, however, to avoid the trap of becoming a captive of the interest groups that are represented on it, and to maintain an independent and creative organic mindset about opportunities for future uses of the State Forest.

B. *Emerald Mountain*

1. Background

Emerald Mountain is approximately 7,000 acres of land immediately adjacent to the town of Steamboat Springs in Routt County, Colorado, in the northwest part of the state.[127] Three or four lessees have leased this parcel for grazing purposes for the last eighty or ninety years with no public access to Emerald Mountain over those years. Emerald Mountain provides the scenic mountain backdrop for the resort town. The citizens of Routt County had always viewed Emerald Mountain as a local asset for its agricultural operators, as well as a permanently preserved mountain backdrop to the city.

Because of escalating real estate values in and around Colorado's ski towns, the value of Emerald Mountain for development purposes rose dramatically during the 1980s and early 90s. With the rising real estate values, the Board in the early 1990s felt compelled to examine the possibilities of developing residential home sites on the parcel. In order to avert what Routt County felt would be a disaster if Emerald Mountain was developed, the Routt County Commissioners and citizens of Routt County adopted two strategies. The first was to support enthusiastically Amendment 16 to the Colorado Constitution in the hope that Emerald Mountain might become a part of the newly conceived Stewardship Trust. The second was for Routt County to secure a planning lease with the State Land Board to engage in a citizen participation planning process to determine appropriate uses for Emerald Mountain.

The Routt County Commissioners, and especially Commissioner Ben Beall, convened a citizen working group to explore the various possibilities for land uses on Emerald Mountain. Routt County has a very sophisticated geographic information system in place and was able to generate very illustrative maps detailing forage, topography, existing uses, and other important considerations. The planning process resulted in the Emerald Mountain Land Use Plan, which was presented to the

127. 2000 ANNUAL REPORT, *supra* note 34.

Colorado State Land Board in January 1998.[128] The Board felt that the plan was deficient in a number of respects as it failed to fully and realistically address the Board's need to make economic decisions about the parcel of land. Specifically, while the plan included some income streams, the plan did not recognize the development value of the land. It only off-handedly planned for the purchase of a conservation easement and did not provide for any realistic funding source for this purchase.

The local working group went back to the drawing board and came up with a plan to purchase Emerald Mountain in segments over a five-year period.[129] The possibility of a locally sponsored limited development arrangement to raise funds for the project as well as other funding sources convinced the Board to accept the proposal.

2. Board Philosophy and Direction

When the Board agreed to the planning lease for Emerald Mountain the directive to Routt County was not clear that the development value of the parcel of land needed to be taken into account. Routt County also believed that Amendment 16's Stewardship Trust provided an off-ramp for the Board to take instead of continuing to focus on some of its economic requirements. After the passage of Amendment 16, the Board reaffirmed its fiduciary requirement to generate a reasonable amount of income that reflected the true value of the parcel. After much back and forth, Routt County agreed to move to a higher level of specificity on the economic part of the land use plan for Emerald Mountain. The Board also directed staff and Routt County to work with real estate and conservation professionals to try to achieve a creative solution to some of the problems raised by Routt County's proposal.

3. Result and Lessons

The result of this process has been that the working group began to understand the Board's fiduciary responsibility to generate income while at the same time searching for creative solutions to the problems. Last year, the working group successfully bid on and acquired the lease and an option to purchase the property over a five-year period. The jury is still out on Emerald Mountain, but with the greater level of understanding by the working group of the Board's responsibilities and through creative professional input to a local citizen planning process, the result is likely to be a far better one than before. The difficulties in making a local activist group understand the Board's fiduciary responsibility to generate income while at the same time searching for creative solutions to the problems, especially after Amendment 16's campaign, make this

128. Interview with Ben Beall, Routt County Commissioner and Chair of Working Group, in Steamboat Springs, Colo. (Jan. 9, 1998).

129. *Id.*

process very long and arduous. The alternative is gridlock through political missteps and confrontational tactics.

C. *Chico Basin*

1. Background

The Chico Basin is an assemblage of parcels of State Trust land in northeastern Pueblo County and southeast El Paso County on the southern Front Range in Colorado.[130] The total acreage owned by the State Land Board in Chico Basin is approximately 150,000 acres.[131] In 1994, the old Board issued a request for proposals on one of the larger parcels of the Chico Basin in which it required a successful bidder to create a management plan for the parcel. The successful bidder on the Chico Basin RFP of 1994 was a consortium of three individuals. The consortium failed to live up to the requirement of completing a management plan. The Board terminated the long-term lease, but allowed them to stay on the ground on a year-to-year basis until a new management arrangement could be developed.

2. Board Philosophy and Direction

In late 1997, the new State Land Board began to focus on the Chico Basin as a chance to experiment with large landscape management and planning. Additionally, the Board purchased an adjacent large ranch from a long-time rancher through The Nature Conservancy ("TNC"). As a condition of the purchase of the ranch, the Board leased it back to TNC for 25 years, which subleased it to the long-time ranch manager. At the time they acquired the additional parcel, the Board also asked the staff to draft a goals statement for management of all parcels within the Chico Basin management area. Additionally, it directed staff to work with local residents and land use and resource experts to generate a landscape management plan for the Chico Basin. The central tenets of the goals document were: to take advantage of existing expertise and local knowledge of the parcel, to plan for long-term sustainable multiple-use and reasonable income generation from the parcel, and to incorporate outdoor education and recreation as elements into a long-term landscape plan.

3. Result and Lessons

The Chico Basin management advisory committee met intensively during the spring of 1998 and returned with a document detailing a set of goals, objectives and tasks for the Chico Basin, which the Board ap-

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130. Interview with John Brejcha, Deputy Director, Colorado State Land Board, in Denver, Colo. (May 20, 1999).

131. *Id.*

proved in August 1998.[132] These goals, objectives and tasks addressed all of the Board's goals and formed the basis for an RFP for the next manager of the Chico Basin landscape. The overlapping goal of both the Board and the management advisory committee has been to take advantage of efficiency of management of such a large landscape and, through the use of creative land management, to enhance the value of the property. The successful proponent for the parcel, Duke Philips, is now in his third year of managing the Chico Basin ranch.

CONCLUSION

Amendment 16 is a fascinating departure from previous Land Board management schemes. It has given the Board the opportunity to value stewardship, the environment and educational opportunities on a par with their requirement to generate revenues. It anticipates moving to another level of land management where the health of the land and public input are strong players in decisions. Isolated approaches rooted in a stubborn adherence to strict fiduciary principles should be rejected in favor of collaborative, cooperative processes. A delicate balancing act among divergent interests may be achieved through heightened local input into the management process. These approaches stand a greater chance of returning benefits, current income as well as natural resource and educational values, to the trust beneficiaries by avoiding the costly and counter-productive snarls of litigation and political backlash. The eyes of the Board's beneficiaries, the legislature, local government, lessees, and the people of Colorado—not to mention other states' land boards and other public land managers throughout the west—are on the State Land Board as it implements Amendment 16 and manages Colorado's state trust lands in the 21st century.

132. *Id.*

AN EXAMINATION OF COURT OPINIONS ON THE ENFORCEMENT AND DEFENSE OF CONSERVATION EASEMENTS AND OTHER CONSERVATION AND PRESERVATION TOOLS: THEMES AND APPROACHES TO DATE

MELISSA K. THOMPSON

JESSICA E. JAY

INTRODUCTION

This article surveys conservation easement enforcement and defense decisions to date, and examines those decisions under the rubric of several general themes. The article focuses on themes influencing or driving the opinions of courts in conservation easement enforcement and defense actions across jurisdictional lines. These themes include issues of standing, ambiguity and the role of intent in judicial decision-making on issues of conservation easement enforcement and defense, judicial attitudes towards restrictive servitudes, the role of common law rules of real property and contract construction and interpretation, and cost-benefit analyses.

Part I of this article provides an overview and survey of the cases reviewed. Part II examines the issue of standing and participation. Part III looks at the roles of intent, common law rules of real property and contract construction, the merger doctrine, and cost-benefit analyses in a series of defense and enforcement opinions. Part III also includes an analysis of a unique line of case involving the Foundation for Preservation of Historic Georgetown. In conclusion, we advise land trusts to anticipate confronting most or all of the issues raised to date in cases involving conservation easement enforcement and defense.

I. OVERVIEW AND SURVEY OF ENFORCEMENT AND DEFENSE CASES TO DATE

For purposes of this article, we examine nineteen published opinions, the group of which resulted from an exhaustive search for enforcement and defense cases in jurisdictions throughout the United States.[1]

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1. Friends of the Shawangunks, Inc. v. Clark, 754 F.2d 446 (2nd Cir. 1985); Nebraska v. Rural Electrification Admin., 23 F.3d 1336 (8th Cir. 1994); Racine v. United States, 858 F.2d 506 (9th Cir. 1988); Madden v. The Nature Conservancy, 823 F. Supp. 815 (D. Mont. 1992); Gallaway v. Idaho Forest Indus., Inc., No. 94-36-M-CCL, 1996 U.S. Dist. LEXIS 21636 (D. Mont. April 22, 1996); Gallaway v. Idaho Forest Indus., Inc., No. 94-36-M-CCL, 1997 U.S. Dist. LEXIS 16645 (D. Mont. March 25, 1997); Friends of the Shawangunks, Inc. v. Clark, 585 F. Supp. 195 (N.D.N.Y.

Our analysis also includes a minimum number of unpublished decisions, or cases subject to appellate review. The majority of cases surveyed here occurred in the East: New York (two), New Jersey (one), the District of Columbia (four), Massachusetts (three), Connecticut (three), New Hampshire (one), Vermont (one), and Pennsylvania (one).[2] This finding is logical because landowners and land trusts in the East have been using conservation easements for a longer period of time than any other part of the country.[3] Of the cases brought in the Midwest/West, three examined take place in federal court.[4] Only two of the Eastern cases analyzed occurred in federal court,[5] and *Natale* was brought only after after the landowners lost soundly in state court in Pennsylvania after a decade of proceedings.[6] In *Madden* and *Gallaway*, Montana state law applied to the claims at issue, and while the *Natale* case ostensibly posed some federal questions, the court rejected those claims.[7]

Landowners trying to invalidate the deed restrictions or servitudes on their property initiated three of the cases reviewed; we refer to these as defense cases because the grantee of the deed restriction is defending

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1984); Natale v. Schwartz, No. 98-3298, 1999 U.S. Dist. LEXIS 18933 (E.D. Pa. Dec. 10, 1999); Sagalyn v. Found. for the Pres. of Historic Georgetown, 691 A.2d 107 (D.C. Cir. 1997); Bagley v. Found. for the Pres. of Historic Georgetown, 647 A.2d 1110 (D.C. Cir. 1994); Found. for the Pres. of Historic Georgetown v. Arnold, 651 A.2d 794 (D.C. Cir. 1994); Acheson v. Sheaffer, 520 A.2d 318 (D.C. Cir. 1987); Southbury Land Trust, Inc. v. Andricovich, 757 A.2d 1263 (Conn. App. Ct. 2000); Burgess v. Breakell, No. 95-0068033, 1995 Conn. Super. LEXIS 2290 (Conn. Aug. 7, 1995); Harris v. Pease, 66 A.2d 590 (Conn. 1949); Goldmuntz v. Chilmark, 651 N.E.2d 864 (Mass. App. Ct. 1995); Knowles v. Codex Corp., 426 N.E.2d 734 (Mass. Ct. App. 1981); Bennett v. Comm'r of Food and Agric., 576 N.E.2d 1365 (Mass. 1991); New Hampshire v. Rattee, 761 A.2d 1076 (N.H. 2000); Redwood Constr. Corp. v. Doornbosch, 670 N.Y.S.2d 560 (N.Y. App. Div. 1998); Redwood Constr. Corp. v. Doornbosch, 655 N.Y.S.2d 655 (N.Y. App. Div. 1997); Friends of the Shawangunks, Inc. v. Knowlton, 64 N.Y.2d 387 (N.Y. 1985); Friends of the Shawangunks, Inc. v. Knowlton, 475 N.Y.S.2d 910 (N.Y. App. Div. 1984); Smith v. United States, 979 F. Supp. 279 (D. VT 1997).

2. *Id.*

3. *See* Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, *in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT AND FUTURE 9, 17-21 (Julie Ann Gustanski and Roderick H. Squires, eds., 2000) [hereinafter, PROTECTING THE LAND].

4. *Madden*, 823 F. Supp. 815; *Gallaway*, 1997 U.S. Dist. LEXIS 16645; *Clark*, 754 F.2d 446.

5. *Natale*, 1999 U.S. Dist. LEXIS 18933, *Smith*, 979 F. Supp. 279.

6. *Natale* is a famous case involving the French & Pickering Creeks Conservation Trust. At the state level, the Trust succeeded in obtaining court orders for the demolition of a house that violated the conservation easement at issue in the case. The landowners refused to remove the house so the Trust made the necessary arrangements and bulldozed the residence. Thereafter, the lanowners filed a number of scattershot constitutional and state law claims in federal court. The state court decisions preceding *Natale* are not published and the authors could not obtain the ten years of court documents in time to include an analysis of the case in this paper.

7. *See Madden*, 823 F. Supp. 815; *Gallaway*, 1997 U.S. Dist. LEXIS 16645; *Natale*, 1999 U.S. Dist. LEXIS 18933.

that tool against attack and attempting to uphold its validity. Two of the three landowners failed to invalidate the deed restriction; one succeeded.[8]

With the exception of two, in all of the cases examined, second (or later) generation landowners owning property already encumbered by some form of deed restriction or conservation easement initiated or defended the actions.[9] In *Burgess*, a neighbor brought a claim against another landowner for failing to adhere to the terms of a conservation easement on the landowner's property; the court found the neighbor lacked standing.[10] In *Acheson*, residents and voters of a town attempted to sue a developer for executing a development plan different from the one they voted to approve, but the court ruled that they too lacked standing to bring the action.[11]

In the enforcement cases, or those in which land trusts or the creators of conservation easements, restrictive covenants, or deed restrictions filed actions against landowners to force them to comply with the terms of restrictions encumbering their property, the violations at issue include construction of new dwellings on property (four),[12] adding to existing dwelling on property (four)[13], subdividing property (two)[14], logging on property (two)[15], changing density or proposing development on property (two)[16], creating a right-of-way across property (one)[17], and building a pool.[18] In one case from the West, a landowner brought suit to determine whether the "scenic easement" on his property precluded construction of dude ranching facilities.[19]

It is important to note that not all of the cases involve conservation easements *per se*. Some involve deed restrictions (*Madden, Gallaway, Harris*),[20] others agricultural restrictions or easements created by statute (*Rattee, Bennett*),[21] and still others involve preservation servitudes

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8. *Madden*, 823 F. Supp. 815; *Harris*, 66 A.2d 590, *Gallaway*, 1997 U.S. Dist. LEXIS 16645.

9. *Burgess*, 1995 Conn. Super. LEXIS 2290; *Acheson*, 520 A.2d 318.

10. *Burgess*, 1995 Conn. Super. LEXIS 2290.

11. *Acheson*, 520 A.2d 318.

12. *Natale*, 1999 U.S. Dist. LEXIS 18933; *Southbury Land Trust, Inc.*, 757 A.2d 1263; *Bennett*, 576 N.E.2d 1365; *Rattee*, 761 A.2d 1076.

13. *Sagalyn*, 691 A.2d 107; *Arnold*, 651 A.2d 794; *Bagley*, 647 A.2d 1110; *Acheson*, 520 A.2d 318.

14. *Sagalyn*, 691 A.2d 107; *Acheson*, 520 A.2d 318.

15. *Burgess*, 1995 Conn. Super, LEXIS 2290; *Knowles*, 426 N.E.2d 734.

16. *Harris*, 66 A.2d 590; *Friends*, 754 F.2d 446.

17. *Redwood Constr. Corp.*, 670 N.Y.S.2d 560.

18. *Goldmuntz*, 651 N.E.2d 864.

19. *Racine*, 858 F.2d at 506.

20. *Madden*, 823 F. Supp. 815, *Gallaway*, 1997 U.S. Dist. LEXIS 16645; *Harris*, 66 A.2d 590.

21. *Rattee*, 761 A.2d 1076; *Bennett*, 576 N.E.2d 1365.

(*Acheson, Bagley, Arnold, Sagalyn*).[22] The balance of the cases involve conservation easements (*Southbury, Redwood, Clark, Goldmuntz*),[23] but all concern a conservation or preservation instrument of some type.

II. STANDING AND PARTICIPATION IN DEFENSE AND ENFORCEMENT CASES

A. *Third Party Standing*

When evaluating the issues of conservation and historic preservation easements, courts have addressed in litigation the question of who can participate in such actions repeatedly.[24] In at least one case, the court examines in detail whether a neighbor had standing to argue that the landowner of property next door to him violated the terms of the easement to which the landowner/grantor was subject.[25] In another case, the court determines that residents and voters harmed by misrepresentations concerning the conservation easement agreed to by a developer lacked standing to challenge alleged violations of the easement.

In *Burgess v. Breakell*, a third-party neighbor brought an action to enforce a conservation restriction.[26] Burgess alleged that Breakell was violating the terms of the conservation restriction at issue by engaging in commercial logging on the property.[27] The conservation restriction on Breakell's land required the property to be maintained as an area of "wild, natural, and semi-natural open space for scientific, educational, scenic, environmental, aesthetic and cultural purposes, for the preservation of its natural features."[28] Breakell argued the court should dismiss Burgess's complaint for lack of standing because the Connecticut Conservation Commission, and not Burgess, held the restriction at issue on his property.[29]

The court agreed with Breakell, finding that Burgess did not have standing to bring the action, and pointed to Connecticut's conservation

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22. *Acheson*, 520 A.2d 318; *Bagley*, 647 A.2d 1110; *Arnold*, 651 A.2d 794; *Sagalyn*, 691 A.2d 107.

23. *Southbury*, 757 A.2d 1263; *Redwood*, 670 N.Y.S.2d 560; *Clark*, 754 F.2d 446; *Goldmuntz*, 651 N.E.2d 864.

24. For example, in *Redwood Construction v. Doornbosch*, the court recognized the standing rights of a contract-vendee to challenge a conservation restriction. Redwood Constr. Corp. v. Doornbosch, 248 A.D.2d 698 (1998). *Doornbosch* involved the holder of a conservation easement across property with an easement of right of way, which Redwood Construction sought to purchase and utilize. *See id.* The court recognized that Redwood, as the contract-vendee, had standing to challenge the construction and application of the conservation easement to the easement right-of-way. *See id.*

25. *Burgess*, 1995 Conn. Super LEXIS 2290.

26. *See id.* at *1.

27. *See id.*

28. *Id.*

29. *See id.* at *2-*3.

restriction statutes.[30] The court expressly acknowledged that "the question of who may enforce a conservation restriction is not clearly resolved by statutory language."[31] Thus, the court could have reached a much different conclusion on the issue of standing in *Burgess*. The court stated that while the Connecticut legislature chose to abrogate certain common law doctrines governing conservation restrictions, it did not specifically abrogate an ownership requirement for standing in an easement dispute.[32] The language of the statutes, asserted the court, shows that the legislature, "while recognizing the public benefit that such [conservation] restrictions provide, intended to limit the enforceability of conservation restrictions to the holder or owner of the restriction."[33] The court relied on statements by the Massachusetts Supreme Court to interpret Connecticut statutes.[34]

In the face of unclear statutory language, the court could have looked to federal environmental laws and cases for guidance on the issue of standing, rather than the laws of Massachusetts. For example, the same principles expressed in *Sierra Club v. Morton* and *Sierra Club v. SCRAP*, wherein third-party citizens with an interest that could be harmed or impaired by the outcomes in the cases were granted standing, could have provided the Connecticut court with an alternative approach to the standing question in *Burgess*, an approach more consistent with the express purposes of the conservation restrictions at issue under Connecticut's General Statutes.[35] There is little doubt that adjacent landowners like Burgess were harmed by Breakell's commercial logging venture; their property values were adversely affected by the activity. Further, the logging operation likely impaired the conservation restriction's public benefit, which was reflected in the "scenic, environmental, aesthetic and cultural" values served by the restriction.[36]

One published decision, at the time of writing this article, cites *Morton* to confirm standing in a suit by a third party in interest. In *Friends of the Shawangunks, Inc. v. Clark*, discussed at length below in section III(B), the United States District Court for the Northern District of New York relied upon allegations in the Friends of the Shawangunks' complaint concerning its mission statement and the adverse effects of the proposed development at issue to conclude that the organization did have standing to bring the action. [37] Friends of the Shawangunks asserted that

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30. *See id.* at *6-*7.

31. *Burgess*, 1995 Conn. Super. LEXIS 2290 at *5.

32. *See id.* at *7.

33. *Id.* at *7.

34. *See id.* at *6.

35. Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

36. *Burgess*, 1995 Conn. Super. LEXIS 2290, at *1.

37. 585 F. Supp. 195, 199 (N.D.N.Y. 1984).

it had been formed "to ensure the preservation and prudent development of the Shawangunk Mountains" and that the development slated for land subject to a conservation easement would "adversely affect" the use and enjoyment of the land by many members of the Friends of the Shawangunks.[38]

In contrast to Friends, in *Knowles v. Codex Corp.*, the court essentially ignored the *Morton* and *SCRAP* principles altogether. In *Knowles*, the court examined whether residents and voters had standing to sue a corporation for misrepresenting its plans for a proposed development, which also included a conservation easement, in a brochure it distributed to all the voters of Canton, Massachusetts prior to a town meeting on the development.[39] After voters agreed to permit development, Codex executed and recorded a plan different from that circulated to the townspeople.[40] The court found that the residents/voters failed to state a claim against Codex or the town's conservation commission (which was joined as a defendant) because the plaintiffs lacked standing to seek an invalidation of the town vote or an injunction for compliance with the original plan.[41] The court stated that none of the residents or voters had standing to pursue their claims because they did not qualify as private individuals litigating questions of public nuisance or the wrongful use of public or private lands under state statutes.[42]

The court asserted that the specific statute establishing a conservation commission to manage and control the public's interests in the land subject to conservation easements safeguarded the town's rights.[43] The court did not address individual resident's rights, but noted in cursory fashion that the court in *Morton* and *SCRAP* relied upon "adversely affected or aggrieved" language in 5 U.S.C. 702.[44] The court's reference to *Morton* and *SCRAP* is so brief that it belies the importance and relevance of the principles in those two cases to the standing issues in cases like *Knowles*. In *Knowles*, it is difficult to skirt the fact that the plaintiffs' interests were adversely affected, not only by the changed development plans, but also by the developer's conduct.[45] In light of the number of cases that we reviewed wherein courts interpret unclear state statutes conservatively, and either ignore or avoid the standing principles set forth in federal environmental cases, it appears state courts may fear opening a floodgate of litigation by conferring standing on plaintiffs traditionally excluded from enforcement rights, or it may be that courts are

38. *Id.*
39. *See Knowles*, at 735-37.
40. *See id.* at 735-36.
41. *See id.* at 738.
42. *See id.* at 737.
43. *See id.* at 737-38.
44. *Knowles*, 426 N.E.2d at 738, n.13.
45. *Id.* at 735-36.

simply reluctant to depart from conventional common law rules holding that only record holders of interests in land have standing to bring actions related to those interests.

One of the noteworthy aspects of *Knowles* is that it appears from the face of the court's published opinion that the defendant-developer pulled a fast one on the community, with the tacit approval of the town's conservation commission. The defendant furnished a development map to voters that was not adhered to upon commencement of the office park, and demolished several historical farm buildings contrary to representations made or implied in meetings with townspeople.[46] The court addressed the defendant's back-handed actions in a footnote only:

> An observant student of the plan might have concluded that at least one of the existing buildings lay in the path of a proposed access road to the 'campus.' An observant student of the formal instrument might have concluded that nothing therein obligated Codex to maintain or preserve any of the existing buildings.[47]

Apparently, the court expected the community to be an "observant student" with regard to the precise language of the agreement, notwithstanding Codex's representations at town meetings.[48] One outstanding question in the case, which cannot be determined from the court's opinion, is why the conservation commission itself declined to challenge the defendant's actions. The reason may be because the commission had reviewed the agreement and understood its implications, contrary to the perceptions and desires of community residents.

B. *Ways that Land Trusts Participate in Civil Actions as Third Parties*

Whether a neighboring landowner or town residents and voters have standing to sue in a lawsuit is a different inquiry from whether a land trust may participate in litigation, within the scope of its trust documents, by intervening in a case to which it is not already a party. The court addresses the question of whether the trustees of a land trust have authority under their Trust Declaration to engage in litigation in *Nebraska v. Rural Electrification Administration.*[49]

In *Rural*, the court debated whether to limit the participation of the Platte River Whooping Crane Maintenance Trust in environmental litigation involving the Grayrocks Dam and Reservoir in Wyoming and the Missouri Basin Power Project.[50] The Trust was established as part of a settlement agreement reached in prior litigation that gave one of the par-

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46. *Id.* at 736.
47. *Id.* at 736, n.8.
48. *Id.*
49. Nebraska v. Rural Electrification Admin., 23 F.3d 1336 (8th Cir. 1994).
50. *See id.* at 1338.

ties in the action an exemption to the Endangered Species Act and permitted construction of the dam and reservoir at issue in *Rural*.[51] In its review of whether the Trust could participate in relicensing proceedings for Grayrock, and more broadly in proceedings related to other dams and legal cases, the court examined the purposes set forth in the Trust Declaration.[52] That document stated as the Trust's purpose: "to finance programs, activities, and acquisitions to protect and maintain the migratory bird habitat in the so-called Big Bend area of the Platte River between Overton and Chapman, Nebraska."[53] As noted by the court, the Trust Declaration also stated that:

> programs, activities, and acquisitions . . . shall be formulated to protect and maintain, consistent with the provisions hereof, the physical, hydrological, and biological integrity of the Big Bend area so that it may continue to function as a life-support system for the whooping crane and other migratory species which utilize it.[54]

The court found that the Trust Declaration did not conflict with the specific directives, also contained in the Declaration, against participation by the Trust in influencing legislation, political campaigns, or any litigation other than litigation directly related to the administration of the Trust.[55]

The court's reliance on, and deference to, the Trust Declaration underscores the importance of clear, well-defined purpose statements for land trusts. The *Rural* court concluded that participation in litigation by the Trust that bore directly on the supply of water flowing to critical crane habitat was within the powers, duties, and administration of the Trust.[56] The court read the Trust Declaration as clearly authorizing the Trustees "to counteract through litigation the depletion and degradation of the critical habitat" of the endangered whooping crane.[57]

When land trusts seek to participate in lawsuits, the trust's purpose or declaration may become an issue, as in *Rural*, along with rules of standing. In *Smith v. United States*, the court rejected the Vermont Land Trust's (VLT) bid to intervene as a matter of right or by permission in a lawsuit concerning a taxpayer's action for a refund of the taxes that both the taxpayer and VLT felt were unwarranted.[58] Smith disputed the tax on his property and the resulting refund because, he argued, the IRS failed to recognize a reduction in the value of his property that resulted from

51. *See id.* at 1337.
52. *See id.*
53. *Id.* at 1338.
54. *Id.*
55. *See id.* at 1338, 1340.
56. *See id.* at 1340.
57. *See id.*
58. Smith v. United States, 95 CV 195, slip. op. at 3 (D. Vt. Sept. 19, 1997).

the imposition of the conservation easement that he had donated to VLT.[59] While VLT argued that it should be permitted to participate on Smith's behalf because of its interest in the recognition and valuation of the conservation easement,[60] the court allowed VLT to participate in the action only as a friend of the court, or *amicus curiae*.[61] The court found that VLT had neglected to address the sovereign immunity of the U.S. government and acquire the waiver necessary for intervention.

Permitting VLT to participate as an *amicus curiae* in the action was the court's way of allowing VLT to voice its position on the issues, without being a party. The court offered, "[I]n many cases, appearance as amicus can be as effective as formal intervention."[62] The court made clear that it valued the land trust's involvement by asserting, "VLT has demonstrated to the Court both a genuine interest in the subject matter at hand as well as expertise in the area of development rights and conservation easements. VLT will therefore be granted the opportunity to be heard by this Court."[63]

In *Smith*, the court not only allowed VLT's participation, but endorsed it and specifically noted the potential value of the land trust's contribution to the case. Land trusts should be encouraged by the court's decision in *Smith*. Even if a land trust cannot intervene as a party in an action by right or by permission, it may still be able to participate in a meaningful way as a resource for the court as an *amicus curiae*.

III. THE ROLE OF INTENT IN ENFORCEMENT AND DEFENSE CASES

Once courts resolve issues of standing and participation, they turn next to the focal point of the dispute, often the meaning and interpretation of the documents at issue. In enforcement and defense cases concerned with the validity and/or construction of particular conservation easements or restrictions, courts have looked beyond the plain language in the easement or restriction at issue and, when faced with what they characterize as an ambiguity, attempted to discern the parties' intent at the time the parties entered into the agreement. This type of analysis appears repeatedly in opinions involving conservation documents and, when combined with other analyses such as cost-benefit evaluations and the role of common law rules, has a marked impact on judicial decision-making.

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59. *See id.*

60. *See id.*; Motion to Intervene (Paper #6), Smith v. United States, 95 CV 195 (D. Vt. Sept. 19, 1997).

61. *See* Smith v. United States, 95 CV 195, slip. op. at 1, 4.

62. *See id.* at 5.

63. *See id.*

A. *Defense and Validity Actions*

Courts have searched for conservation easement drafters' intent in a trio of cases in which the parties opposed to the easement challenge the validity and enforceability of the conservation restrictions prior owners placed on property.[64] These are cases in which a prior or current landowner or land trust is forced to defend the validity and enforceability of the easement or restriction on the property while the parties opposed to the restrictions, here all second (or later) generation landowners, hope to do away with the restrictions altogether by arguing that the original intent was not to create such a restriction in the first place.

In the first of the three, *Madden v. The Nature Conservancy*, the owners of the Shining Mountain Ranch sought a declaratory judgment in hopes of invalidating the restrictions placed on the property by The Nature Conservancy.[65] After a determination that a reservation under Montana law can create conservation servitudes, the court examined the actual language of the deed transferring the property from The Nature Conservancy to the Maddens' predecessor to determine the intent of the parties who created the original restrictions.[66]

The court looked to two specific clauses in the covenants and servitudes incorporated into the deed from The Nature Conservancy. The first stated: "[t]he rights retained by the Grantor by the covenants are the following . . . ,"[67] and the second stated: "[a]fter title to the surface of the land has been conveyed to a third party, then the Grantor shall retain the same rights of enforcement, with the same privileges and discretions."[68] The Maddens argued that conflict between the uses of the word "retain" in the two clauses made it impossible for the second clause to have reserved conservation rights.

Avoiding what it referred to as an "overly technical interpretation of words" to ascertain the parties' intent, the court found that "retain" means "reserve," and that The Nature Conservancy had reserved property restrictions in its conveyance to the Maddens' predecessor, which rights and reservations were still in effect when the deed was subsequently conveyed to the Maddens.[69] The court ruled, therefore, that The Nature Conservancy held a valid servitude on the Shining Mountain Ranch, which was enforceable against the Maddens.[70] One notable aspect

64. *Madden*, 823 F. Supp. 815; *Harris*, 66 A.2d 590; *Gallaway*, 1997 U.S. Dist. LEXIS 16645.
65. *Madden*, 823 F. Supp. at 816.
66. *See id.* at 817.
67. *Id.*
68. *Id.*
69. *Id.* at 818.
70. *See id.* at 819.

of *Madden*, which contrasts the case to others discussed *infra*, is that the court specifically reviewed the entire document at issue to determine the intent of the parties, and not just isolated phrases or sections.

In a second validity case, *Gallaway*,[71] the parties cross-motioned for summary judgment on the issue of whether restrictions on the subject property were valid and enforceable.[72] Van Hook co-owned 125 acres in Montana, which he and his co-owners sold to Gallaway and Ritter in 1975 by way of a contract that contained restrictive covenants limiting natural resource development, specifically timber harvesting.[73] Although the contract for purchase contained express restrictions, the warranty deed transferring the property did not.[74] Hasstedt purchased the property from Gallaway and Ritter in 1991, also by a contract containing restrictive language, and a deed that did not.[75] Hasstedt assigned his contract for deed to the Merritts by quitclaim deed, made subject to the express restrictions in the contract.[76] The Merritts sold the property to defendant Idaho Forest Industries, Inc. ("IFI") in 1992 by a warranty deed that stated the property was free from encumbrances except for those of record.[77] IFI admitted having knowledge of the timber harvest restrictions, but after purchasing the land promptly notified the plaintiffs that it considered the restrictions unenforceable.[78]

Gallaway and Van Hook argued that the restrictions were valid conservation servitudes reserved pursuant to Mont. Code Ann. § 70-17-102(7)[79] and, as such, could be held "in gross" in order to allow the burden on the property to run with the land even though the benefit did not touch or concern any land.[80] IFI argued that Gallaway and Van Hook failed to reserve such an interest in the property.[81] In the alternative, IFI asserted that any restrictions reserved by the plaintiffs were extinguished by merger because the plaintiffs owned the land at the same time that the restrictions were placed on it.[82]

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71. *Gallaway*, 1997 U.S. Dist. LEXIS 16645; *Gallaway*, 1996 U.S. Dist. LEXIS 21636.

72. *Gallaway*, 1997 U.S. Dist. LEXIS 16645, at *2.

73. *See id.* at *2.

74. *See id.* at *3.

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. The court takes pains to point out, though, that Gallaway and Van Hook originally argued that the restrictions were restrictive covenants running with the land under §§ 70-17-201, *et seq.*, but that the plaintiffs subsequently conceded that the restrictions, called "restrictive covenants", failed to place a benefit on the land at issue, or any of the tract of land that touched or concerned the property, and so only imposed a burden on the property that did not run with the land.

80. *See Gallaway*, 1997 U.S. Dist. LEXIS 16645, at *3-4.

81. *See id.* at *4.

82. *See id.*

The court concluded that the intent of the parties was to restrict logging on the property *only* until the purchase price for the property was paid, and not perpetually.[83] The court found support for this position by citing the absence of restrictive language in the warranty deed (even though such language appeared in the contract for purchase and subsequent buyers took notice of the restrictions), which it referred to as a key fact in the case.[84] Because the court found that a warranty deed controls questions about the extent and nature of parties' rights after a contract for deed terminates, and that the warranty deeds at issue contained no limiting language, the court found it to be a *matter of fact* that the parties did not intend the restriction on logging to run with the land.[85] The court reached this conclusion in spite of Gallaway's and Van Hook's assertions that it was their *intention* to preserve the natural integrity of the property by limiting natural resource development, timber harvesting *in particular*.[86] Even with the original parties to the contract explaining their intent, the court justified a contrary finding regarding the parties' intent through the absence of limiting language in the warranty deed.[87] The court stated further that even if the warranty deed had possessed such restricting language, it would have found the restrictions therein to be unenforceable by way of merger.[88]

Gallaway represents an instance where the court appears to determine the proper outcome of the case, and then subsequently devises the intent of the parties in a way that supports and justifies its findings. The court never references the actual language in the restrictions in the conveyance documents. This omission, combined with specific language in the court's opinion, disclose the possible underlying reason for the outcome in *Gallaway*: loss of economic value. A "let's not lose this valuable timber" undercurrent in the magistrate's recommendation in the case is overt; the presence of that concern in the district court's opinion is more subtle.

U.S. Magistrate Judge Holter explained in a footnote:

> These restrictions are, in substance, timber reservations designed to prevent the harvesting of trees from the land in question. This court recognizes that a contract reserving timber rights may be so made as to . . . reserve to the grantor a perpetual right to have the timber remain on the land . . . . However, because the creation of an unlimited interest in all existing timber and all the timber to be grown in the future severely curtails the use of the soil itself and greatly diminishes

83. *See id.* at *10.
84. *See id.*
85. *Id.* at *2.
86. *See Gallaway*, 1997 U.S. Dist. LEXIS 16645, at *2.
87. *See id.* at *2-3.
88. *See id.* at *10.

> its value, the intention to create such an extensive timber interest must be very clearly manifested.[89]

So what Magistrate Holter appears to aver is while it is clear that Gallaway and Van Hook intended to create timber harvesting restrictions, and IFI purchased the land with notice of those limitations, the court will not uphold them. The magistrate relies on the merger doctrine to justify extinguishing the conservation restriction.[90] But under the circumstances, the merger doctrine's applicability is suspect at best. The court applies that doctrine in spite of the fact that one of IFI's predecessors entered into a contract to purchase the land from the plaintiffs under certain terms and conditions, a contract that called for transfer of the deed two years from the date of the contract subject to certain reserved rights (including the restriction).[91] One explanation for the magistrate's strained opinion on intent and the applicability of the merger doctrine is a possible underlying proverbial thorn in his side: a cost-benefit perspective on the perceived loss of a heavily-forested parcel.[92]

The district court makes reference to the heavily-forested nature of the land at issue in *Gallaway*.[93] The court then goes on to rely on the warranty deeds to determine "as a matter of fact that the intention of the parties was to restrict logging only until the purchase price was paid."[94] The court so finds in spite of express language in the original conveyance documents that it was the express intention of the parties to protect the land's natural character and that all vegetation on the property was to "remain undisturbed by forces other than nature."[95] The conveyance document also conferred standing on the plaintiffs and any of plaintiffs' heirs or assigns to bring an action for any violation of the restrictive covenants.[96] How, then, can the district court characterize the restrictive documents as a "temporary security device?"[97] It does so based on an underlying set of values, the first of which appears to be free and reasonable land use, e.g. timber harvesting.[98]

With respect to *Madden* and *Gallaway*, it is worthwhile to comment on the merger doctrine to which the courts refer in those opinions. The doctrine of merger operates in situations where a dominant estate benefits from, and a servient estate is bound by, a servitude. If the owner of the dominant estate acquires title to the servient estate, the two estates

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89. *Gallaway*, 1996 U.S. Dist. LEXIS, 21636, at *20, n.8 (citations omitted).
90. *See id.* at *19.
91. *See id.* at *15-16.
92. *Gallaway*, 1997 U.S. Dist. LEXIS 16645, at *2.
93. *Id.* at *2.
94. *Id.* at *10.
95. *Gallaway*, 1996 U.S. Dist. LEXIS 21636, at *3.
96. *Id.* at *2-3.
97. *Gallaway*, 1997 U.S. Dist. LEXIS 16645, at *10.
98. *Id.* at *11.

merge and the servitude is extinguished.[99] The merger doctrine is of particular importance when considering the law of conservation easements because although a conservation easement may be imposed on a piece of property "in gross," or without a dominant estate,[100] some courts hold that if the owner of an easement acquires the fee title to the eased property, the easement is extinguished.[101]

In addition to a common law doctrine of merger, several states provide for the extinguishment of conservation easements by merger in their state conservation easement statutes.[102] Colorado and Utah are two such states.[103] By contrast, Mississippi and New York specifically prohibit the extinguishment of conservation easements by merger.[104] Land trusts and landowners in states without statutory language either specifically permitting or prohibiting termination of conservation restrictions by merger may find themselves the vagaries of courts applying traditional common law rules like the doctrine of merger to eradicate intended conservation tools.[105]

The federal court in Montana has twice examined the validity and enforceability of conservation restrictions in the context of Montana's statutory merger doctrine.[106] Montana recognizes conservation easements in the form of conservation servitudes reserved pursuant to Mont. Code Ann. § 70-17-102(7).[107] It also recognizes, however, the doctrine of merger in Mont. Code. Ann. § 70-17-105, which states "[a] servitude thereon cannot be held by the owner of the servient tenement," and § 70-17-111, which states that "[a] servitude is extinguished by the vesting of the right to the servitude and the right to the servient tenement in the same person."[108]

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99. *Gallaway*, 1996 U.S. Dist. LEXIS 21636, at *15.

100. A servitude in gross allows the burden to run even if the benefit side does not touch or concern any land.

101. *Gallaway*, 1996 U.S. Dist. LEXIS 21636; *Madden*, 823 F. Supp. 815.

102. Todd D. Mayo, A Holistic Examination of the Law of Conservation Easements, in PROTECTING THE LAND, *supra* note 5, at 46. For more information on merger, Mayo cites William R. Ginsberg, The Destructibility of Conservation Easements through Merger, THE BACK FORTY, August 1991, at 5-8, and Paul Doscher and Sylvia Bates, Merging Ownership of Conservation Easements with Fee Interests: The Experience of the Society for the Protection of New Hampshire Forests, THE BACK FORTY, August 1991, at 1-4. *Id.*

103. Colo. Rev. Stat. § 38-30.5-107 (2000); Utah Code Ann. § 57-18-5 (2000).

104. See Todd D. Mayo, A Holistic Examination of the Law of Conservation Easements, in PROTECTING THE LAND, *supra* note 5, at 46.

105. *See id.* at 47.

106. *Gallaway*, 1996 U.S. Dist. LEXIS 21636; *Madden*, 823 F. Supp. 815.

107. The section of the code provides that "the following land burdens or servitudes upon land may be granted and held though not attached to land . . . (7) the right of conserving open space to preserve park, recreational, historic, aesthetic, cultural and natural values on or related to land." Mont. Code Ann. § 70-17-102(7) (2000).

108. *Gallaway*, 1996 U.S. Dist. LEXIS 21636 at *15.

In *Madden*, the landowner argued that The Nature Conservancy reserved a conservation easement on the Shining Mountain Ranch before conveying the property and, therefore, actually granted the servitude to itself. As a result, argued Madden, the conservation easement was extinguished by merger.[109]

The court disagreed.[110] It focused on timing and concluded that at no time did The Nature Conservancy hold fee title *and* the conservation restriction together because it "clearly" conveyed the fee to Shining Mountain Ranch and reserved the conservation easement *simultaneously*.[111]

While the court in *Madden* recognized a simultaneous conveyance of restriction and fee, the court in *Gallaway* did not.[112] Although the same court again examined the timing of the reservation of the easement and the conveyance of fee title, in *Gallaway* it agreed with the purchaser.[113]

The doctrine of merger is important to note because, according to the two federal Montana cases, if the owner of a property reserves a conservation easement in a deed prior to selling the property, the easement may merge with the dominant estate.[114] Similarly, if a land trust, as the holder of a conservation easement, acquires fee title to eased property, that easement runs the risk of being extinguished, particularly in states with statutes like Montana's, or in states where statutes are silent and courts apply the common law doctrine of merger.[115]

Following *Madden* and *Galloway*, *Harris v. Pease*, an early 1949 case, is the last in the trio of cases that we examined in which courts have looked to the intent of the parties to determine a conservation restriction's validity.[116] There, Harris filed a declaratory judgment action to determine the validity and enforceability of a development restriction.[117] Harris' predecessor-in-interest, Doyle, had restricted development on

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109. *Madden*, 823 F. Supp. 815.

110. *Gallaway*, 1996 U.S. LEXIS 21636.

111. The court states:

> Clearly, if the court is to follow the dictates of the Montana Supreme Court and 'ascertain the intent of the grantor from a consideration of the entire instrument,' it must conclude that the reservation was made contemporaneously with the passing of title and that title to the conservation rights and the fee estate have never been merged.

Madden, 823 F. Supp. at 816.

112. *Gallaway*, 1996 U.S. Dist. LEXIS 21636.

113. *See* discussion *supra* notes 70-100 and accompanying text.

114. *See* discussion *supra* notes 70-100 and accompanying text.

115. *See* Todd D. Mayo, A Holistic Examination of the Law of Conservation Easements, in PROTECTING THE LAND, *supra* note 5, at 46.

116. *See Harris v. Pease*, 66 A.2d 590 (Conn. 1949).

117. *See Harris*, 66 A.2d at 590.

eight of the fifty-one acres that Harris purchased.[118] Harris acquired the land with actual knowledge of the restriction.[119]

Before Harris bought property from Doyle, Pease purchased land from Doyle directly across from the restricted property and paid more for it *because of* the restriction, which was of great value to her property.[120] The court asserted that Harris' proposed development of the eight acres "would result in serious damage to [Pease] by interfering with the view from her property and disturbing her privacy and quiet."[121]

Harris argued that the restriction against building on the eight-acre tract should not extend beyond the life of, or twenty-one years after the death of, the grantee.[122] The court ruled against Harris, and explained that the restriction against building in the original deed created a servitude in the nature of an easement for the benefit of the grantee's (Doyle's) retained property (later purchased by Pease).[123] The court upheld the prior deed restriction as intended to be "a perpetual restriction."[124]

Defendant Pease benefited from the restriction imposed by Doyle. The eight acres provided her with an "unusually extensive and picturesque view."[125] This description appears in the court's opinion, and may indicate that Judge Maltbie had the opportunity to view the property at issue.[126] Additional language in the opinion further reflects the court's attitudes. The judge notes that the restricted tract was used by Doyle for farming, and since its sale, "corn, hay and other crops have been raised on it; and it is particularly adapted for use as an orchard."[127] The court describes the surrounding country as "rural in its characteristics, sparsely settled, and consist[ing] in the main of woodland and farms."[128] This kind of specificity and familiarity with respect to the land in question may aid a party arguing for the validity and enforceability of a restriction. It certainly appears to have worked in Pease's favor before the rise in use of conservation easements and other preservation tools.

Foreshadowing major concerns for the conservation easement movement, the court in *Harris* stated specifically, "the fact that the plaintiff's property would be of more value if the restriction were re-

118. *See id.* at 591.
119. *See id.*
120. *See id.* at 590.
121. *Id.* at 591.
122. *See id.*
123. *See Harris*, 66 A.2d. at 591.
124. *Id.* at 592.
125. *Id.* at 590.
126. *See id.*
127. *Id.* at 590-91.
128. *Id.* at 591.

moved is of no consequence."[129] While holding that the restriction at issue was not against public policy nor void because it ran in perpetuity, the court acknowledged potential issues in future cases involving land restrictions. The court opined:

> That does not, of course, mean that there may not be circumstances which would render such restriction invalid . . . . Under peculiar circumstances, it may be so contrary to public policy that the law would hold it void, as where it is of no benefit to anyone and its enforcement might seriously interfere with the proper development of the community. Changed circumstances, such as use of the defendant's property for other than residential purposes, might produce a situation where equity would refuse to enforce even an appurtenant right of this nature.[130]

Judge Maltbie implies here that a cost-benefit analysis, depending upon the circumstances in the future, might justify voiding the restriction upheld in *Harris*.[131] Whether a conservation restriction interferes with community development and whether the doctrine of changed conditions warrants that a restriction be nullified, asked in the context of a cost-benefit analysis, are threats to conservation and preservation instruments no matter how well intended and drafted.

B. *Construction and Enforcement Cases*

In the same way that intent plays an important role in cases involving the validity of easements or other restrictions, it also appears as a crucial factor in conservation enforcement actions focused not on questions of the validity of the agreement itself, but rather on the meaning and interpretation of provisions in conservation easements.

In *Friends of the Shawangunks Incorporated v. Clark*, a nonprofit corporation and four of its members challenged a decision by the National Park Service under the Land and Water Conservation Fund Act of 1965.[132] The federal government provided matching funds to the state of New York for acquisition of approximately 1400 acres in fee simple and 240 acres as a conservation easement in and around a significant state park with a large natural lake.[133] Friends contended that the defendants did not fulfill their obligations under the Land and Water Conservation Fund Act, which governed the federal government's funding, when they decided to allow Marriott Corporation to expand a golf course and related facilities across the 240 acres subject to the conservation

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129. *Id.* at 592.

130. *Harris*, 66 A.2d at 592.

131. *Id.*

132. *See* Friends v. Clark, 585 F. Supp. 195, 196 (N.D.N.Y. 1984), *rev'd*, 754 F.2d 446 (2nd Cir. 1985).

133. *See Clark*, 585 F. Supp. at 197.

easement.[134] The United States District Court for the District of New York framed the question in the case as whether a conversion would occur.[135] The Conservation Fund Act, 16 U.S.C. § 460 1-8(f)(3) provides: "No property acquired or developed with assistance under this section shall, without the approval of the Secretary [of the Interior], be converted to other than public outdoor recreation uses."[136]

The district court determined that no conversion would occur because "public, outdoor, recreation" activities would be increased by Marriott's use of the acreage.[137] The court stated that the public had no right of access under the conservation easement, and expanded rights of access once a golf course was constructed on the land.[138] The court described the mostly-private golf course as a "bonus to the public."[139] The court explained that because the eased-lands were "not intended for outdoor, public, recreational use there [could] be no conversion" under the Act.[140]

In citing only a general portion of the language in the conservation easement itself in its decision, the district court downplayed the role of the document in the controversy. Instead, the court relied upon the language of the Land and Water Conservation Fund Act and the duties of the Secretary.[141] Construing the term "conversion," the court opted for a narrow, exclusive definition of outdoor public recreational use.[142] Intent of the grantor of the conservation easement played no role in the lower court's decision. The district court referred briefly to language from the document stating that the easement was acquired "for the purpose of, but not solely limited to, the conservation and preservation of unique and scenic areas . . . ," but the court never mentions it again in its opinion.[143]

On appeal, the Second Circuit reversed the district court.[144] In doing so, the appellate court cited considerably different provisions of the conservation easement and adopted a noteworthy tone. After reciting the case's procedural history and applicable federal laws, the court commenced the substantive part of its ruling with the following passage:

> The Shawangunks Range, located in Ulster County, New York, is noted for spectacular rock formations, sheer cliffs, windswept ledges with pine barrens, fast-flowing mountain streams and scenic water

134. *See id.* at 196.
135. *See id.* at 197.
136. *Id.*
137. *Id.* at 200.
138. *See id.*
139. *See Clark*, 585 F. Supp. at 200-01.
140. *Id.* at 200.
141. *See id.*
142. *Id.* at 201.
143. *Id.* at 197.
144. *See Clark*, 754 F.2d at 452.

> falls, as well as a series of five mountain lakes, the 'Sky Lakes.' Of these, Lake Minnewaska is one, with extremely steep banks and many magnificent cliffs rising as high as 150 feet along its northern and eastern shores.[145]

The court then noted the surrounding landscape, which consists of large tracts of open space, and the public use of the surrounding 22,000 acres by hikers and other limited recreational activities.[146] One interpretation of the disparity in the two courts' decision making rests upon the elemental possibility that the district court cared not one whit for the landscape at stake whereas the Second Circuit court from the outset of its opinion expressed great respect and appreciation for the natural beauty of the area at issue in the suit. This difference in values alone may account for the different outcome at the appellate level.

The Second Circuit emphasized the purpose of the conservation easement to conserve and preserve "unique and scenic areas" in its opening section reciting the law of the case that the conservation easement provided that the fee owner

> shall not develop or erect new facilities within the described area; alter the landscape or terrain; or cut trees but may operate, maintain and reconstruct existing facilities within the easement area, including, but not limited to buildings, roads, utilities and golf courses; provided that (a) Any reconstruction shall be in the same location and utilized for the same purpose as that which existed on the date hereof and that such reconstructed facilities shall be no larger in area than the facility being replaced.[147]

The lower court did not cite these provisions.

In its Discussion section, the Second Circuit explained that it interpreted public outdoor recreational uses more broadly than the district court because of the "policies of the Department of Interior and the purposes of the statute" (the Conservation Fund Act).[148] The appellate court interpreted public outdoor recreational uses to encompass uses not involving the public's actual physical presence on the property.[149] "After all," asserted the court, "Webster's Third New International Dictionary (1971) defines 'recreation' as 'refreshment of the strength and spirits after toil, . . .'; surely by exposing scenic vistas and serving as a buffer zone between Minnewaska State Park and developed areas, the easement area provides such refreshment."[150]

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145. *Id.* at 447-48.
146. *Id.* at 448.
147. *Id.*
148. *Id.* at 449.
149. *Id.*
150. *Clark*, 754 F.2d at 449.

The court used a manual from the Department of the Interior as support for its definition of public outdoor recreational uses.[151] The Department's manual authorizes land acquisition for its scenic or natural values.[152] The court concedes that a surface reading of the Act indicates that Congress intended primarily active physical recreation.[153] However, the court opines, the Act itself as well as its legislative history reveal broader intentions.[154]

The court then refers to a Senate Report that mentions the need to improve the "physical and spiritual health and vitality of the American people."[155] In an era of law-making focused on cost-benefit analyses, takings and individual property rights, a circuit court making references to spiritual values is remarkable indeed.[156] The tone and import of the court's opinion, which ascribes values to land that transcend the simple notion of property as a base commodity, sets the opinion apart from most legal doctrine. The Second Circuit concluded that the proposed amendment to the conservation easement approved by the Secretary constituted a conversion. "It is after all," stated the court, "a conservation fund act."[157]

In the last section of its opinion, the court expressly recognized the time and expense invested by Marriott in the project.[158] And the court confirmed that courts do not control the process of land planning and development.[159] It noted that undertaking a private project like Marriott's necessarily involved expenses that presumably would be recouped by charging the ultimate consumer.[160] Of the cost-benefit argument, the court responded, "the court's duty remains to follow the law as written and intended."[161]

Likewise in *Goldmuntz v. Town of Chilmark*, the appeals court of Massachusetts upheld the validity of the restrictions set forth in the conservation easement at issue there.[162] In *Goldmuntz*, the plaintiff applied for a permit to build an in-ground swimming pool in an area near the existing dwelling on the property.[163] The Chilmark Conservation Commission notified plaintiff that building the pool would violate the conser-

151. *See id.* at 450.
152. *See id.*
153. *Id.*
154. *Id.*
155. *Id.* at 450.
156. *Id.*
157. *Clark*, 754 F.2d at 450.
158. *See id.* at 452.
159. *See id.*
160. *See id.*
161. *Id.*
162. *See* Goldmuntz v. Chilmark, 651 N.E.2d 864, 866 (Mass. App. Ct. 1995).
163. *See Goldmuntz*, 651 N.E.2d at 865.

vation easement.[164] A land court judge ruled in the plaintiff's declaratory judgment action that the proposed pool was a structure within the meaning of the easement, and not an improvement of the existing dwelling or an accessory structure appropriate to certain passive recreational uses.[165] The court supported its decision defining a pool as a structure by citing to the town code, which also defined swimming pools as structures for purposes of zoning set back requirements.[166]

The appellate court's analysis begins with the issue of intent. "The grantor's stated purpose," noted the court, was "to restrict the use of [the property] and retain it predominantly in its natural, scenic and open condition . . . ."[167] It found that the lower court had properly concluded that the grantor "wanted a tight rein kept on changes to the [p]roperty."[168]

The conservation easement controlling the court's decision in *Goldmuntz* contains specific and detailed prohibitions. To support its ruling, the court relied on the provision in the easement restricting "[a]ny surface use of the land, except for agricultural, farming, forest, outdoor recreational or other purposes consistent with allowing the land and related areas to remain predominantly in their natural condition."[169] Additionally, the court could have relied on another restriction in its decision to reach the same conclusion barring construction of the pool: the prohibition of "[e]xcavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such a manner as to affect the surface."[170]

The Massachusetts appellate court's decision is interesting in that it cites the grantor's intent at some length even though the conservation easement contains clear language restricting the construction of a swimming pool. A harder question for the court may have been an application by the plaintiff to build an indoor pool attached to the existing dwelling. Would that proposal have fallen in the category of "an improvement to the existing dwelling" or an accessory structure?[171] The court noted that it would allow a bathhouse near the existing swimming pond, for example, because it would be an accessory to a passive use of the property.[172]

In *Clark* and *Goldmuntz*, the courts cited intent and based their opinions on specific and detailed provisions of the conservation ease-

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164. *See id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 866.
169. *Goldmuntz*, 651 N.E.2d at 866.
170. *Id.* at 867.
171. *Id.*
172. *Id.* at 866.

ments at issue.[173] The court in *Rattee v. Commissioner* likewise relied on specific language of the restriction at issue, and the court used that language to determine the outcome in the action.[174] In the latter case, Rattee defended against the claims brought against him by trying to persuade the court that the agricultural preservation restriction (APR) that applied to his property contained ambiguous language.[175] An APR is a conservation restriction created by statute based entirely on protecting agricultural uses of land.[176] In *Rattee*, the defendant purchased two parcels totaling 185 acres at a foreclosure sale.[177] The former owners had granted the State of New Hampshire the APR.[178] After purchase, Rattee arranged for the house on a 3.3 acre farmstead site exempt from the APR to be burned down.[179] He then excavated a field in preparation for construction of a 5,500 square foot home with a 1,500 foot driveway, plans which would have eliminated two acres of the property from agricultural use.[180] The State informed Rattee that he was violating the APR shortly after he applied for a building permit.[181]

The court upheld the building restrictions contained in the APR.[182] The APR expressly required Rattee to seek prior approval for construction from the commissioner for the department of agriculture.[183] Rattee argued that he did not need approval because although the APR contained an express provision mandating it, the state statutes creating the APR did not contain approval requirements.[184]

In ruling in favor of the State, the court cited the state statute at issue:

> The stated purpose of RSA chapter 36-D is to 'recognize the importance of preserving the limited land suitable for agricultural production to safeguard the public health and welfare by encouraging the maximum use of food and fiber producing capabilities of the state's

173. *See Clark*, 754 F.2d at 449; *See Goldmuntz*, 651 N.E.2d at 866.

174. *See* Rattee v. Commissioner, 761 A.2d 1076, 1080 (N.H. 2000).

175. *See id.*

176. *See Rattee*, 761 A.2d at 1082; "The statutory purpose of an APR is 'to recognize the importance of preserving the limited land suitable for agricultural production . . . and to ensure the protection of agricultural land facing conversion to non-agricultural uses." *Id.* N.H. REV. STAT. ANN. RSA Chapter 36-D, (Repealed 1985).

177. *See Rattee*, 761 A.2d at 1078.

178. *See id.*

179. *Id.* at 1079.

180. *See id.*

181. *See id.*

182. *See id.* at 1083.

183. *See Rattee*, 761 A.2d at 1078.

184. *See id.* at 1080.

> agriculturally suitable land and to ensure the protection of agricultural land facing conversion to non-agricultural uses.'[185]

"Thus," reasoned the court:

> [W]hile the APR statute and deed both reserve the right to construct 'dwellings to be used for family living,' requiring prior approval for such construction is consistent with the statutory purpose. Prior approval ensures that family dwellings will be constructed in a manner that minimizes their impact on agricultural production and prevents potential abuse of the family dwelling exception.[186]

In other cases, rather than examining the specific, detailed provisions of the easement or other restriction at issue, courts instead frame the issues in a particular case in such a way as to shape the outcome of the action. The importance of the way courts frame issues is evident in *Southbury Land Trust, Inc. v. Andricovich*, in much the same way as in *Clark*.[187] In *Clark*, the lower court emphasized a conventional definition of 'public outdoor recreational activities' and virtually ignored the language of the conservation easement itself.[188] In reversing the lower court, the Second Circuit relied on the agreement and the intent reflected there to conserve natural and scenic areas.[189] Similarly in *Southbury*, the court's decision depends upon how the court frames the issue.[190] There, the court found that construction of an additional dwelling unit, separate from the original residence, was consistent with the drafters' intent to preserve a working farm.[191] The court disregarded express language evidencing the drafters' intent "to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space use."[192] The latter language also appears in the General Statutes for Connecticut. The opinion states that the conservation easement at issue was to be a conservation restriction within the meaning of the statutes.[193]

In spite of the specific language concerning the retention of land in its predominantly natural condition, the court ruled that Andricovich could construct a separate residence for family members on the property.[194] The court writes: "The plain language of sections 2 (c) and (b) of the conservation easement clearly allows for the construction of a detached single-family home . . . . Clearly, the drafters wanted to pre-

185. *Id.*
186. *Id.*
187. *See Southbury Land Trust, Inc.*, 757 A.2d 1263; *Clark*, 754 F.2d at 449.
188. *See Clark*, 754 F.2d at 449.
189. *See Southbury Land Trust, Inc.*, 757 A.2d 1263.
190. *Id.* at 1266.
191. *Id.* at 1267.
192. *Id.* at 1264.
193. *Id.*
194. *See id.* at 1267.

serve the pastoral aspects of [the] parcel . . . ."[195] The provisions cited as clearly allowing construction are as follow:

> To restrict Parcel C to its agricultural and open space use, within Parcel C land, buildings and other structures shall be used for the following purposes and no other:
>
> (b) A single detached dwelling for one (1) family and not more than one (1) dwelling per lot, except as provided in subparagraph c below.
>
> (c) An additional dwelling unit for one family in a dwelling or another building, provided that the same is used only as a residence for one or more members of the family of persons directly employed in the operation of the uses in subparagraph a above on Parcel C of [the district] . . . .[196]

The land trust argued that these provisions meant a single family dwelling attached to or constructed within the existing house or another existing farm building.[197] The land trust also asserted that the court failed to consider the conservation easement as a whole in rendering its interpretation of the above-stated provisions.[198]

To support its decision that the conservation easement clearly provided for construction of a separate family dwelling, the court cited Southbury's town code.[199] As in *Goldmuntz*, the court turned, not to the conservation easement itself for a definition consistent with the easement's intent, but to local ordinances.[200] The code defined dwelling unit as a building or a part of a building, which the court essentially found dispositive of the issue as to whether the defendant could construct a separate building.[201] Finally, the court discussed the drafters' intent, concluding that they could have been more clear in the conservation easement if they wanted to restrict construction and that restricting ownership to family members ensured preservation of the pastoral setting.[202] Arguably, the court could have decided *Southbury* either way; the court's finding of clear language in the conservation easement, and the court's emphasis on the drafters' intent to preserve a working farm, as opposed to the drafters' intention to preserve the property in its natural and open condition, carried the day.

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195. *Id.* at 1266.
196. *Southbury Land Trust, Inc.*, 757 A.2d at 1264.
197. *See id.* at 1265.
198. *See id.* at 1266.
199. *See id.* at 1265.
200. *See id.*
201. *Id.*
202. *See id.* at 1266.

The court in *Redwood Construction Corporation v. Doornbosch* emphasizes not the actual language of the conservation easement at issue, but rather what it lacks.[203] There, plaintiff Redwood purchased and subdivided a parcel.[204] One of its lots lacked public street access, so Redwood sought to purchase an easement over an access way used by defendant Doornbosch and other area property owners.[205] Before transfer of the easement, Redwood learned that the Doornbosch's property was subject to a conservation easement.[206] The easement "prohibited any improvements or changes to the Doornbosch property that would affect its natural, open and scenic nature, or would cause damage to an environmentally-sensitive flood plain."[207] It further provided that changes in the use of the Doornbosch property could not be effected without the written consent of the West Branch Conservation Association.[208]

The court asserted that: "[h]ere, the restrictive covenants set forth in West Branch's conservation easement do not expressly address or prohibit the proposed use of the access way at issue."[209] Rather, said the court:

> [T]he conservation easement expressly reserved to the grantors the right to 'sell, give away or otherwise convey the Protected Property or any portion or portions thereof, provided such conveyance is consistent with and subject to the terms of this Conservation Easement,' and prohibited only those changes in use of the property 'as would be detrimental to any significant open space interest, significant natural habitat interest or other significant conservation interest sought to be protected by this Conservation Easement.'[210]

The court found that West Branch unreasonably withheld its consent to plaintiff's purchase of the easement. Of note to land trusts and litigators is the court's finding in the opinion that "Redwood presented an unrebutted prima facie case that its de minimis proposed use of the Doornbosch property would not be inconsistent with West Branch's conservation easement."[211] Read: likely, plaintiff hired a credible expert witness who signed an affidavit that plaintiff submitted with its motion for summary judgment; defendants probably did not submit an expert opinion to rebut plaintiff's expert in their response to plaintiff's motion thereby providing grounds for the court to declare that Redwood had presented "an unrebutted prima facie case."

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203. *See Redwood Constr. Corp.*, 248 A.D.2d at 699.
204. *See id.* at 698.
205. *See id.* at 698-99.
206. *See id.* at 699.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Redwood Constr. Corp.*, 248 A.D.2d at 699-700.
211. *Id.* at 700.

Of particular interest in *Redwood* is the court's insistence on the detail lacking in West Branch's easement, *e.g.* no specific provision barring plaintiff's easement purchase.[212] The court seems to imply that express prohibition would have had to be present in order for the court to find for the defendants. Significant increased traffic and widening of the access road appear to outside analysis to be detrimental to both the open space interest and natural habitat of the property.[213]

In contrast to *Redwood*, in *Racine v. United States*, the Ninth Circuit expressly noted that the drafter of the "scenic easement" at issue could have prohibited the challenged activities specifically in the document.[214] *Racine* involved a federal statute that authorized the Secretary of Agriculture to acquire "scenic easements" in the Sawtooth National Recreation Area in Idaho.[215] A second-generation landowner with a scenic easement on his property brought suit to overturn the government's position that building structures for dude ranching violated the terms of the easement.[216] The easement provided, "[w]ith reference to 36 C.F.R. § 292.16(g)(1), it is agreed that only one residence and one tenant dwelling are authorized within the easement area."[217] Section 292.16(g)(1) allows structures that do not "substantially impair or detract" from the scenic, wildlife and other natural values of the land.[218] The section refers to dude ranching specifically as permitted activity.[219]

The court affirmed the lower court's interpretation of the restriction in the scenic easement, saying there was only one way to read the provision consistently.[220] The court held that the provision meant: "only one residence and one tenant dwelling will be permitted among the other dude ranching facilities permitted under . . . [section 292.16(g)(1)]."[221] Faced with seemingly contradictory, ambiguous language, the court emphasized that "it would have been easy for the Government's drafter to place language in the deed prohibiting all dude ranching buildings . . . ."[222]

Although the court ruled for the plaintiff-landowner on the issue of the construction of dude ranching structures, it upheld the lower court's denial of his motion for attorney fees.[223] The court opined that the gov-

212. *See id.* at 699.
213. *Id.* at 700.
214. *See Racine*, 858 F.2d at 509.
215. *See Id.* at 507.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 508-09
221. *Id.*
222. *Id.* at 509.
223. *Id.*

ernment's interpretation of the easement was reasonable and that its position was "substantially justified."[224]

C. *The Georgetown Cases*

A line of three cases, each decided between 1994 and 1997, litigated by the same organization in one district's lower and appellate courts provide a unique opportunity to examine a developing series of opinions by an appellate court dealing with issues concerning conservation and preservation easements.[225] These three cases involve Deeds of Scenic, Open Space and Architectural Facade Easements held by the Foundation for Preservation of Historic Georgetown (the Foundation) and appealed to the District of Columbia Court of Appeals.[226]

In the three cases, the court notes that in controversies over the correct interpretation of a contract, ambiguity and the parties' intent play key roles.[227] In these cases, where the court determines that the agreement is unambiguous and clear on its face, the court reasons that the agreement speaks for itself.[228] If the court finds that the easement document is ambiguous, the court seeks to ascertain the parties' intent by examining the document in light of the circumstances surrounding its execution, by examining any agreements or documentary evidence outside the four corners of the agreement, and, if necessary, by applying traditional rules of contract construction.[229] The court emphasizes in the Georgetown line of cases, however, that ambiguity in the language of deeds and contracts is to be construed in accordance with the intent of the parties insofar as it can be discerned from the language of the instrument itself.[230]

Bagley v. Foundation for the Preservation of Historic Georgetown was brought by the Foundation for the Preservation of Historic Georgetown against two homeowners (collectively "Bagley") to enforce the terms of an easement that applied to Bagley's home.[231] The easement prohibited Bagley from building any structure on his property, encroaching on any presently open space, or obstructing a view of the building facade from the street without first obtaining written consent

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224. *Id.*

225. *See* Bagley v. Found. for the Pres. of Historic Georgetown, 647 A.2d 1110 (App. D.C. 1994); Found. for the Pres. of Historic Georgetown v. Arnold, 651 A.2d 794 (App. D.C. 1994); Sagalyn v. Found. for the Pres. of Historic Georgetown, 691 A.2d 107 (App. D.C. 1997).

226. *See id.*

227. *See id.*

228. *See Bagley*, 647 A.2d at 1113.

229. *See Arnold*, 651 A.2d at 796.

230. *See Bagley*, 647 A.2d at 1113; *See Arnold*, 651 A.2d at 796; *See Sagalyn*, 691 A.2d at 111-12.

231. *See Bagley*, 647 A.2d at 1111.

from the Foundation.[232] In late 1989, Bagley began to construct a two-story addition on the back of his residence to house new air conditioning units.[233]

When it learned in December 1989 of the addition Bagley was building, the Foundation informed Bagley that he had violated the easement on his property by failing to obtain the Foundation's permission for the construction.[234] In addition, argued the Foundation, the construction itself violated the easement by increasing the footprint of the existing house.[235] Although Bagley acknowledged that he should have requested permission to make changes to the house, still he asked the Foundation for a special accommodation allowing him to keep the addition.[236] The Foundation took the position that it would consider alternative design proposals for the house, but only after Bagley removed the addition.[237] Bagley refused.[238]

The Foundation filed a two-count complaint against Bagley in Superior Court in February 1991 alleging multiple violations of the easement.[239] The Foundation sought an injunction to force Bagley to remove the addition, as well as declaratory and other relief including an award of attorney fees and costs under the express terms of the easement.[240] Bagley counterclaimed for $1 million in damages and reformation or rescission of the easement.[241] He argued, among other positions, that the Foundation had selectively and, therefore, unfairly enforced its easements.[242]

The Foundation filed a motion for summary judgment on both of its claims.[243] The trial court denied the motion in part but did order Bagley to obtain a demolition permit to remove the addition.[244] It also awarded attorney fees and costs to the Foundation.[245] While the appellate court stayed the injunction against Bagley, the trial court declined to stay a hearing on attorney fees and costs. The trial court awarded the Foundation $78,304.85.[246] The appellate court then consolidated Bagley's first

232. *See id.*
233. *See id.*
234. *See id.*
235. *See id.*
236. *See id.* at 1112.
237. *See Bagley*, 647 A.2d at 1112.
238. *See id.*
239. *See id.*
240. *See id.*
241. *See id.*
242. *See id.*
243. *See id.*
244. *See Bagley*, at 1112. .
245. *See id.* at 1113.
246. *See id.* at 1112-13.

appeal concerning the restrictive easement violation with his second appeal on the issue of fees and costs.[247]

On appeal, Bagley argued that the language of the easement was ambiguous.[248] The court disagreed, and refused to "create ambiguity where none exists." It found instead that Bagley's arguments were altogether unpersuasive.[249] The court relied on what it determined to be the unambiguous language of the easement, and emphasized that the easement *expressly prohibited* the building of additional structures on the property and any extension of the existing building into open space.[250] The court concluded at the outset of its opinion that, at the very least, the easement required Bagley to obtain prior written approval from the Foundation before making any changes to his home's facade or its surrounding open space.[251]

One of the many arguments posited by Bagley during the course of the litigation concerned a previous easement that he had donated to the Foundation.[252] In that easement, explained Bagley, only the front of the house and property were subject to restrictions.[253] Therefore, he argued, he legitimately believed that the second easement was only pertinent to the front of his house and property.[254] This argument is of some interest here because in *Arnold*, discussed *infra*, the easement the landowner granted to the Foundation contained restrictions that did apply only to the front of the house.[255] The easement in *Arnold* had been granted in 1980, the easement in *Bagley* in 1988.[256] The issues and outcomes in *Arnold* and *Bagley* may reflect evolution in terms of easement drafting on the part of the Foundation.

To decide *Bagley*, the appellate court relied upon the actual language of the easement at issue.[257] The court's holding hinged, in part, on Section 4(f) of the easement, which provided that the Foundation will "exercise reasonable judgment and care in performing its obligations and exercising its rights under the terms of this easement."[258] In response to Bagley's contention that it was unreasonable for the Foundation to demand that he demolish his addition before any negotiations could take place, the court noted that the Foundation could have entered the prop-

247. *See id.* at 1113.
248. *See id.*
249. *Id.*
250. *See id.*
251. *See Bagley*, 647 A.2d at 1113.
252. *See id.* at 1112, n.2.
253. *See id.*
254. *See id.*
255. *See Arnold*, 651 A.2d at 795-96.
256. *See id.* at 795; *See Bagley*, 647 A.2d at 1111.
257. *See Bagley*, 647 A.2d at 1113.
258. *Id.*

erty and removed the addition itself.[259] The fact that the Foundation refrained from exercising its harshest remedy for Bagley's violation seemed to influence the court's ruling positively.

In addition to affirming the lower court's ruling on Bagley's violation of the easement at issue, the appellate court upheld the trial judge's award of attorney fees and costs, citing specific language from Section 10(d) of the easement, which provided that: "[i]n the event [Bagley is] found to have violated any of [his] obligations, [he] shall reimburse [the Foundation] for any costs or expenses incurred in connection therewith, including court costs and attorneys' fees."[260] In a sharp reprimand of Bagley's scattershot tactics, the court stated, "Bagley cannot litigate tenaciously and then be heard to complain about the time necessarily spent by plaintiff in response."[261] It continued unapologetically by stating:

> In the present case, a clear violation of the easement agreement was brought to Bagley's attention at an early date. It was or should have been readily apparent that Bagley had no viable defense. Instead of coming promptly into compliance, Bagley interposed various defenses and counterclaims, some of which (e.g. his 'due process' claims, his 'selective enforcement' theory, and his demands for 'reformation' and 'rescission') were, in our view, patently frivolous. Approximately two-thirds of the Foundation's billable hours were addressed to discovery and litigation regarding Bagley's altogether implausible defense theories and counterclaims.[262]

Although the trial court reduced the Foundation's fee award for some of the hours billed by the associate attorney on the case, both the trial and appellate courts authorized payment of attorney fees for the two Foundation attorneys.[263]

The court in *Bagley* found that the language of the easement was unambiguous on its face. The court's strict adherence to the language of the easement in *Bagley* is notable because the court does not rely on, or abuse, the opportunity for interpretation of the parties' intent to reach a particular decision. Of note to land trusts is the fact that even though Bagley tried to strong-arm the Foundation by bringing myriad scattershot claims and seeking one million dollars in damages, the court found Bagley's claims, indeed his efforts to intimidate, "altogether implausible."[264]

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259. *See id.*
260. *Id.* at 1115.
261. *Id.* at 1114-15.
262. *Id.* at 1115.
263. *See Bagley*, 647 A.2d at 1115. .
264. *Id.* at 1113, 1115.

In a decision that followed closely on the heels of *Bagley*, the Foundation appealed from a trial court's order granting summary judgment in an action it brought for declaratory and injunctive relief to enforce an easement granted by Arnold's predecessor in *Foundation for the Preservation of Historic Georgetown v. Arnold*.[265] The Foundation argued that Arnold violated the terms of his easement by laterally enclosing a space between two dormer windows on the roof of the dwelling and by building a seasonal awning across the patio at the rear of the house.[266]

The court examined two clauses of the easement. The first prohibited Arnold from undertaking any "construction, alteration, or remodeling . . . which would affect the exterior surfaces herein described, or increase the height, or alter the exterior façade . . . or the appearance of the building . . . ."[267] Section 1 of the easement defined "[t]he exterior surface of improvements . . . on the subject premises as those depicted in the photographs attached . . . to the easement and those improvements visible from the front of the house."[268] Because the photos of Arnold's house taken at the time of the donation of the easement, and the language of the easement itself, referred to the front of the house only, the Foundation was forced to agree that Section 1 did not prohibit Arnold's changes to the premises.[269]

The Foundation turned instead to a general, less-forceful second clause, which provided that "[n]o extension of the existing structure or erection of additional structures shall be permitted," and argued that the enclosure between the windows and the patio awning extended the house in terms of interior density in a way that violated the easement.[270] The Foundation's argument depended upon interpretation of the meaning of the word extension. If the court found that the term extension was ambiguous, asserted the Foundation, then the court could look to the appraisal that was prepared contemporaneously with the easement as an indication that the parties intended to prohibit increased density in the building's interior.[271]

The court scrutinized the language of the document and began its inquiry with a determination that the term extension was ambiguous.[272] The court iterated that because the term was not defined in the easement,

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265. *See Arnold*, 651 A.2d at 795.

266. *See id.*

267. *Id.* at 796.

268. *Id.*

269. *See id.* Land conservation organizations can take away one important lesson from *Arnold*: photograph the entire site to be protected, *e.g.* the house, ranch, wetland et al.. Armed with photographs of the back of Arnold's house, the Foundation probably would have prevailed in the action.

270. *Id.*

271. *Arnold*, 651 A.2d at 795.

272. *Id.*

it could mean many things, and it could find no other language in the easement to eliminate the ambiguity of word.[273]

Because the court found the term extension to be ambiguous, it opened the door for consideration of extrinsic evidence as an indication of the parties' intent.[274] The Foundation argued that the contemporaneously-prepared appraisal evidenced the meaning of extension.[275] The court disagreed, finding that the appraisal did not evidence what *both* parties intended at the granting of the easement because it was prepared solely by and for the grantor of the easement.[276]

In rejecting extrinsic evidence, the court turned to traditional rules of construction, which are common law rules governing contract interpretation.[277] The court cited the well-recognized rule that restrictions on land use are to be construed *in favor* of the free use of land and *against* the party who drafted the document.[278] The Foundation argued that this common law rule should apply only to restrictive covenants, and not to statutorily-created conservation and preservation easements.[279] The court dismissed this argument as vague and unconvincing.[280] Because the Foundation lost on its only argument for the appraisal as extrinsic evidence, it was hamstrung by common law rules of construction having nothing to do with the intent of the parties.

An important doctrinal question raised by *Arnold* is whether traditional common law rules of construction related to real property restrictions should even apply in cases involving conservation easements or restrictions. In any such easement, the intent of the parties is expressed as preservation or conservation. Why, then, do courts like the District of Columbia apply rules of construction that contradict the goals of the parties and the entire justification for a grantor's tax break? Arguably, the well-recognized rule of construction that "restrictions on land use should be construed in favor of the free use of land and against the party seeking enforcement" has no business being recognized at all by courts determining enforcement and defense disputes concerning conservation easements.[281]

One court among the published opinions that we reviewed recognized this issue.[282] In *Bennett v. Comm'r of Food and Agriculture*, the

273. *See id.* at 796-97.
274. *See id.*
275. *Id.* at 797.
276. *See id.*
277. *Id.*
278. *Arnold*, 651 A.2d at 797.
279. *See id.*
280. *Id.*
281. *Id.*
282. *See Bennett*, 576 N.E.2d 1365.

Massachusetts Supreme Court upheld the plain meaning of an agricultural preservation restriction (APR) that conferred approval authority on the Commissioner with respect to the location of dwellings on the property subject to the APR.[283]

Bennett sought to build a large, hilltop house on his 250 acre farm, which was subject to an APR granted by Bennett's predecessor-in-interest.[284] The Commissioner of Food and Agriculture determined that the location would cause erosion as well as the loss of about two acres of farmland, and he offered Bennett five other possible building sites.[285] Bennett filed suit and argued that the provision conferring authority on the Commissioner was unenforceable under common law rules requiring privity of estate or contract in order for a party to enforce a servitude.[286] The court responded to Bennett's argument by asserting that:

> [W]here the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross have no continuing force. In such a case, the appropriate question is whether the bargain contravened public policy when it was made and whether its enforcement is consistent with public policy and is reasonable.[287]

In a footnote, the court explained further:

> What we decide here does not, of course, endorse the enforcement of all easements in gross. It does, however, prompt us to observe that certain common law rules concerning the creation, validity, and enforcement of servitudes may no longer be sound and that we are willing to reconsider them in appropriate cases.[288]

In cases involving the enforcement and defense of conservation easements and other restrictive servitudes, courts should follow the Massachusetts Supreme Court's lead, especially when considering the relevance of traditional common law rules regarding the free use of land as well as those rules requiring that real property limitations be construed restrictively and against their drafters.

In keeping with its examination in *Arnold*, the court in *Sagalyn v. Foundation for the Preservation of Historic Georgetown* also relied on rules of construction to reach its decision.[289] The court began its inquiry

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283. *See id.* at 1366, 1368.
284. *See id.* at 1365.
285. *See id.* at 1365-66.
286. *See id.* at 1365.
287. *Id.* at 1367.
288. *Id.* at 1368, n.4.
289. *See Sagalyn*, 691 A.2d 107.

by focusing on the language of the easement and whether it was ambiguous.[290]

In *Sagalyn*, second generation homeowners challenged the conservation and preservation easement encumbering their Georgetown property, which property was comprised of several different residential lots.[291] The easement imposed several restrictions on the alteration, use, division, and conveyance of the property, including a prohibition against subdivision or conveyance of the property, except as a unit.[292] It also provided that in the event of violation of its covenants or restrictions, the grantee could institute a suit for injunctive relief and recover costs and attorney fees if it prevailed.[293]

When the Sagalyns purchased their property a conservation and preservation easement already encumbered it.[294] Before they purchased the property, the Sagalyns requested, and the Foundation granted, permission to construct a swimming pool.[295] After they purchased the property, the Sagalyns sought another waiver of the easement to construct a one-story addition to their kitchen, which the Foundation denied.[296]

Without the Foundation's knowledge, the Sagalyns applied for and obtained a zoning change, which consisted of a new record lot designation for the property from multiple lots to a single lot of record, as a preliminary step towards securing a building permit for the kitchen addition they desired.[297] Even though the Foundation spoke in opposition to issuance of the permit at a hearing before the Commission of Fine Arts, the Commission issued the permit to the Sagalyns anyway, without making any findings related to the easement.[298]

The parties attempted to settle the dispute over the kitchen addition on several different occasions without success.[299] At one point, the Foundation offered to let the Sagalyns replace their existing kitchen wall with a glass wall if they would also agree to pay the Foundation's attorney fees and costs to date, which amounted to about $11,000.00.[300] The Sagalyns refused.[301] To protect its rights with respect to a timely challenge of the issuance of the building permit, the Foundation filed a complaint

290. *See id.*, at 111.
291. *See id.* at 109.
292. *See id.*
293. *See id.*
294. *See id.*
295. *See id.*
296. *See Sagalyn*, 691 A.2d at 109.
297. *See id.* at 109-10.
298. *See id.* at 110.
299. *See id.*
300. *See id.*
301. *See id.*

for declaratory and injunctive relief to enforce the easement.[302] The trial court enjoined the Sagalyns from constructing any addition without the Foundation's approval and referred the Foundation's request for attorneys' fees and costs to a mediator.[303] After mediation failed, the trial court entered final summary judgment in favor of the Foundation, concluding that the Sagalyns had violated the easement by having their multiple lots re-designated as a single lot.[304]

At issue on appeal was the meaning of subdivide as used in the servitude, which read: "[t]he property shall not be subdivided, nor shall it ever be devised or conveyed except as a unit."[305] The Sagalyns argued that the term should be given its plain, ordinary, and usual interpretation in accordance with *Webster's Third New International Dictionary* and *Black's Law Dictionary*, which define subdivide as to divide into smaller parts and subdivision as the division of a lot, tract, or parcel of land into two or more lots, tracts, or parcels for sale or development.[306] The Foundation contended that "subdivide" is a term of art without any plain or ordinary meaning.[307]

Based upon the Historic Landmark and Historic District Protection Act and local regulations, the court determined that "subdivide" could be interpreted in a number of different ways.[308] Both the Act and local regulations defined "subdivide" to mean both the division of land and the assembly of it.[309] Once the court determined that "subdivide" could mean two different things, the court turned to rules of construction.[310] The court cited the objective law of contracts, which states that the written language of an agreement will govern the parties' rights unless its meaning is unclear.[311] "[T]he first step in contract interpretation," asserted the court, "is determining what a reasonable person in the position of the parties would have thought the disputed language meant."[312]

It is hard to imagine any reasonable person defining subdivision as anything other than a division of property into two or more smaller parcels. Leave it to the masters of legal wrangling, including both legislators and lawyers, to come up with an assemblage version of the word subdivide. Notwithstanding the counter-intuitive meaning of subdivide in the

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302. *See id.*
303. *See Sagalyn*, 691 A.2d at 109.
304. *See id.* at 111.
305. *Id.*
306. *Id.*
307. *Id.* at 111-12.
308. *See id.* at 112.
309. *See id.*
310. *See id.* at 112.
311. *See id.* at 111.
312. *Id.*

District of Columbia as well as the court's previous ruling in *Acheson*,[313] the *Sagalyn* court held that the homeowners violated the subdivision prohibition of the conservation easement by obtaining a zoning change that assembled their multiple lots into two.[314]

Having agreed with the Foundation's interpretation of the word subdivide, the court partially upheld the lower court's $33,994.65 award of attorney fees and costs under the express provisions of the easement.[315] The Sagalyns argued that the Foundation was not entitled to fees and costs related to its claim for injunctive relief because the Sagalyns had agreed not to start construction of the addition until the dispute was resolved.[316] The appellate court agreed with the homeowners and ruled that the Foundation's injunctive relief claim was premature.[317] The court remanded the attorney fees and costs issue to the district court for a determination of the proper amount of the award, which would be reduced by amount of the fees and costs related to the injunctive relief claim only.[318]

The Georgetown cases provide the only opportunity to date to examine one court's approach to analyzing conservation and preservation easements over time in the context of defense and enforcement actions. We learn that if a court cannot readily assess the meaning of the document and the parties' intent, as it could not in *Arnold*, then a court may turn to traditional common law rules. Because common law principles of property as well as contract construction and interpretation are not consistent with the goals of conservation statutes, decisions wherein courts rely on common law rules, are most often at odds with the original conservation purpose of an easement and the intent of the parties. Land trusts enforcing and defending easements should provide evidence of the plain meaning of the easement by pointing to clear, unequivocal, uncontradicted language in the document itself (which, of course, requires that such language be drafted clearly), and, if necessary, by bolstering the document's meaning with extrinsic evidence of the drafters' intent, such as with an appraisal or baseline. Once a court has determined that it cannot devise the meaning of a document or the intent of its drafters from the conservation easement or other restrictive document itself, then a court may evaluate the document in terms of common law real property and contract doctrine, where, as we have seen, anything goes.

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313. *Acheson*, 520 A.2d 318.
314. *Sagalyn*, 691 A.2d at 115.
315. *See id.* at 114, 115.
316. *See id.* at 114-15.
317. *See id.*
318. *See id.* at 115.

IV. PRELIMINARY FINDINGS FOR LAND TRUSTS

Considering what we have reviewed and looking ahead, land trusts can and should anticipate confronting most or all of the issues raised to date in cases involving conservation easement enforcement and defense. Legal opinions to date spotlight themes that will arise in future litigation: third-party standing; the role of carefully drafted purpose and intent statements in trust documents and conservation documents alike; traditional common law rules involving real property rights and contract construction and interpretation; the merger and changed conditions doctrines; and how cost-benefit analyses may influence judicial decision-making.

In light of the outcomes so far in enforcement and defense cases, conservation and preservation organizations with sound drafting practices and solid documents should feel confident. However, several strategies are worth considering. For example, can land trusts draft conservation documents designed to contract around some of the issues that have arisen in litigation? Such qualifying language as "This conservation easement shall not be subject to extinguishment by the doctrines of merger or changed conditions" may provide ammunition in a challenge. Inserting a provision such as "Any question as to the validity or interpretation of this conservation easement shall not be determined on the basis of cost-benefit analysis" may force a court to limit its considerations in a particular enforcement or defense action in a way favorable to land trusts.

Many creative drafting possibilities exist for anticipating future challenges, at least in terms of traditional legal doctrine and court opinions to date. In addition to the suggestions described above, land trusts should contemplate and implement the following, as appropriate:

- Drafting of thorough and consistent conservation documents.

We see this principal play out in most of the cases that we analyzed because in a civil action courts look first and foremost to the language within the four corners of a conservation document. The more thorough and consistent the document, the better the chance a court will uphold its restrictions. Drafting for ambiguity, or amending a conservation document to resolve an enforcement issue, weakens a land trust's ability to enforce restrictions and uphold the conservation values of its easements. Particularly with regard to drafting for ambiguity, dangers arise for land trusts because courts to date have turned to common law rules of property and contract to interpret conservation documents. Where ambiguity exists in conservation documents, courts may apply common law rules that further compromise a conservation document's purpose.[319]

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319. *See* discussion *supra* Section III(C) for case law on this point.

- Inclusion of clear and unambiguous statements of intent and purpose.

In cases involving conservation documents that courts determine are ambiguous, the courts turn to the question of the parties' intent in executing the agreement at issue. Section III of this paper addresses the role of intent and the cases in that section demonstrate how important statements of intent and purpose can be in conservation documents.

- Make deliberate choices with respect to picking battles; e.g. are the permitted and prohibited uses in the conservation document tied directly to the document's purpose section.

As evidenced by the cases that we examined in this paper, the strength of conservation documents and the attitudes of a tribunal are important considerations for a land trust evaluating its position for purposes of litigation. If a court chooses to look beyond the restrictive language in a document, or finds that language ambiguous, a clear and consistent statement of purpose tied to the prohibition a land trust seeks to enforce is extremely useful.

- Anticipate issues that may arise as a result of changed conditions and draft documents accordingly.

The court in *Harris v. Pease*,[320] stated that changed conditions in the future could give rise to circumstances justifying elimination of the land use restrictions at issue in the case. If the purpose of a conservation easement is narrow, for example to preserve a crane rookery, a particular endangered species of plant, or a wetlands area, it is important for land trusts to try to think ahead 100 years or more to a changed landscape. Will the purpose of the conservation easement still exist, or will the restrictions be voided by elimination of the purpose of the original easement? Is the goal long term preservation of the land or just the specific ecological feature of the property? Although narrow purpose statements in conservation documents aid land trusts' stewardship efforts and assist in litigation when the particular purpose is at risk from landowner activity, a long view of the conservation effort is important and conservation easements should contain language barring extinguishment by changed conditions.

- In litigation, know your tribunal and provide detailed and scenic visual images of the property at issue; before a receptive tribunal, present the multidimensional nature of land and our interaction with it, e.g. the ecological, wildlife, historical and spiritual aspects of a particular landscape; photo documentation can be invaluable for resolving disputes.

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320. *See* discussion *supra* Section III(A).

The *Friends of the Shawangunks* and *Bagley* cases, illustrate these principles best. The maxim "a picture is worth a thousand words" applies with double force to land use issues generally, and especially when the integrity of a natural landscape is at issue as it so often is in conservation easement enforcement and defense cases.

- Be prepared in litigation to confront the possibility that a court may apply a cost-benefit analysis to the issues.

The starkest example of this threat in the cases we examined is in *Gallaway*.[321] Also, the court in *Harris* references this issue specifically. Land trusts should anticipate the cost-benefit issue in drafting their documents, as suggested above, and, when relevant in litigation, be prepared to present a court with their own economic analyses of the benefits of conserving land. Courts may or may not uphold the waiver of the cost-benefit defense (which is the intended effect of the proposed language stated above), but even so such provisions are worth including in conservation documents.

- When it is appropriate and useful, do not hesitate to formally mediate disputes and to seek legal remedies and attorney fees and costs.

As we have seen in the cases discussed in this paper, courts generally uphold conservation documents. And courts will award substantial attorney fees and costs, as in *Bagley*. Land trusts should feel confident as a result of our findings, and be willing to consider litigation issues now as a preventive measure, as well as to continue to improve their conservation documents.

CONCLUSION

Based upon our examination of the case law to date, land trusts should be aware that courts are considering common law doctrines and economic factors in their examination of conservation documents. While courts are examining the intent of the parties, they also reject evidence of the parties' intent and devise their own interpretations of documents. Land trusts should prepare for defense and enforcement actions by formulating responses in these areas with the knowledge that a court may not rely upon the land trust's testimony as to intent or the facts of a situation, but may look elsewhere for guidance in decision-making.

In the evolving area of law on conservation easement defense and enforcement, land trusts can look forward to court opinions that clarify and illuminate the issues addressed so far in litigation. Land trusts should also cast a wary eye toward our courts for opinions that may not comport with the values and goals of the land trust conservation movement and

321. *See* discussion *supra* Section III(A).

the sincere intentions of landowners to preserve the natural, scenic and wildlife values on their property. Many challenges lie ahead, like for example establishing the rights of standing for third-parties in all jurisdictions to bring citizen actions to enforce conservation easements. Land trusts and their legal counsel are definitely up to the task.

FOREST LAND TAXATION IN THE NEW MILLENNIUM: STEWARDSHIP INCENTIVIZED

DAVID J. COLLIGAN*

INTRODUCTION

"Don't tax you, don't tax me. Tax that fellow behind the tree."[1] Chances are that fellow behind the tree is a private forest owner.[2] These woodland owners increasingly feel pressure due to property taxation and urban sprawl. In the last century, property owners broke up large industrial forest tracts and abandoned marginal farms. Once abandoned farmland "on the hills," owners sold their tracts "for amenity values, recreational use, and in some cases, timber production."[3] The self-perception of modern forest owners is evolving to a view of themselves as ephemeral stewards of the land with a responsibility to enhance future enjoyment and use of the forests.

Quietly, but steadily, this forest stewardship evolution caused or coincided with a revolution in the state taxation of forests. A vast majority of the states changed their ad valorem tax rules[4] to encourage the forest owner to perpetuate forest land and develop forest management plans utilizing sound silvicultural practices.[5]

SUMMARY

Section I, of this article examines the historical revolution that created a different property tax scheme for forest land as it evolved during

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1. George F. Will, *Morality and the 'Martini' Lunch*, NEWSWEEK, Oct. 17, 1977, at 120.

2. *See generally* Thomas Lundmark, *Methods of Forestry Law-Making*, 22 B.C. ENVTL. AFF. L. REV. 783, 784 (1995) (relaying that "[s]eventy-two percent of the commercial timberland in the United Stated is in private ownership").

3. *See* Hugh O. Canham, *New York State Forest Preserve*, *in* 2 ENCYCLOPEDIA OF AMERICAN FORESTS AND CONSERVATION HISTORY 491 (Richard C. Davis ed., 1983).

4. In 1982, Siegel and Kerr found that 39 states possess laws that reduce property taxes for forest lands. William C. Siegel and Ed Kerr, *Update on Property Tax Laws*, 88 AM. FORESTS 36, 37-38 (July 1982). *See infra* Table I, Forest Class or Current Use column shows that this number is now 47.

5. *See infra* Table I. Table I lists states that require management plans as a prerequisite to obtaining property tax relief.

the twentieth century. Section II reviews the constitutional underpinnings of the Equal Protection Clause in both State and Federal Constitutions. Section II then reviews how the courts have interpreted the Equal Protection Clause in permitting the passage of forest land taxation statutes. Section III examines the incentives the new tax laws created, such as the incentive to produce timber and to encourage non-timber benefits. Non-timber benefits include such benefits as wildlife, recreation, and aesthetic appreciation. Section III also describes how to use yield taxes to more fairly tax forest land. Section IV reviews how each state's law has tried to balance the tension between local issues and state public policy. Finally, Table I illustrates the current forest taxation statutory schemes of all fifty states.[6]

I. A BRIEF HISTORY OF PRIVATE FOREST LAND TAXATION

What a difference a century makes! At the beginning of the last century, forty-one states had constitutional provisions requiring that the states equally apply all property taxes.[7] Ad valorem taxation is the term that defines equal taxation of land based on property value.[8] Therefore, owners of forest land at the beginning of the last century expected to be taxed based upon the relative value of their properties compared to other similarly situated properties. However, the states often compared property forest land to farmland. But unlike farmland, where crops have a usual rotation of one year[9] with annual income to pay property taxes, forest land's timber has rotations sometimes exceeding one hundred

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6. *See infra* Table I.

7. Forty-one states have constitutional provisions addressing equality of taxation and/or ad valorem taxation. These states are: Alabama (ALA. CONST. art. XI, § 211), Alaska (ALASKA CONST. art. VIII, § 17), Arizona (ARIZ. CONST. art.9, § 1), Arkansas (ARK. CONST. art. XVI, § 5(a), California (CAL. CONST. art. XIII, § 1), Colorado (COLO. CONST. art. X, § 3), Delaware (DEL. CONST. art. VIII, § 1), Florida (FLA. CONST. art. VII, § 2), Georgia (GA. CONST. art. VII, § 1, ¶ III), Idaho (IDAHO CONST. art. VII, § 5), Illinois (ILL. CONST. art. IX, § 2), Indiana (IND. CONST. art. X, § 1), Kansas (KAN. CONST. art. 11, § 5), Kentucky (KY. CONST. § 171), Louisiana (LA. CONST. art. VII, § 18), Maryland (MD. CONST. art. XV), Michigan (MICH. CONST. art. IX, § 3), Minnesota (MINN. CONST. art. X, § 1), Mississippi (MISS. CONST. art. IV, § 112), Missouri (MO. CONST. art. X, § 3), Montana (MONT. CONST. art. VIII, § 4), Nebraska (NEB. CONST. art. VIII, § 1), Nevada (NEV. CONST. art. X, § 1), New Jersey (N.J. CONST. Art. VIII § 1 ¶ 1), New Mexico (N.M. CONST. art. VIII, § 1), North Carolina (N.C. CONST. art. V, § 2), North Dakota (N.D. CONST. art. X, § 5), Ohio (OHIO CONST. art. XII, § 2A), Oklahoma (OKLA. CONST. art. X, § 5), Oregon (OR. CONST. art. IV, § 32), Pennsylvania (PA. CONST. art. VIII, § 1), South Carolina (S.C. CONST. art. X, § 1), South Dakota (S.D. CONST. art. VI, § 17), Tennessee (TENN. CONST. art..II, § 28), Texas (TEX. CONST. art. VIII, § 1-a), Utah (UTAH CONST. art. XIII, § 2), Virginia (VA. CONST. art. X, § 1), Washington (WASH. CONST. art. VII, § 1), West Virginia (W. VA. CONST. art. X, § 1), Wisconsin (WIS. CONST. art. VIII, § 1), Wyoming (WYO. CONST. art. I, § 28). The states without any such provisions are: Connecticut, Hawaii, Iowa, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.

8. The term "ad valorem" is defined as "a tax imposed on the value of property." BLACK'S LAW DICTIONARY 51 (6th ed. 1990).

9. *See generally* John H. Davidson, *Conservation Agriculture: An Old New Idea*, 9 WTR NAT. RESOURCES & ENV'T. 20, 21 (1995) (illustrating the one year time period of crop rotation).

years[10] with infrequently produced income from the timber harvest.[11] At about this time, the science of silviculture in this country was rapidly developing and the highest level of government was recognizing wise forest management.[12] In a seminal monograph appearing in Roosevelt's Conservation Commission report in 1909, the director of the United States Department of Agriculture, Fred Rogers Fairchild, criticized the wisdom of applying traditional ad valorem taxation methods to forest land.[13] Essentially, Fairchild concluded that ad valorem taxation acted as a disincentive to long-term timber management.[14]

In 1924, Congress passed the Clarke-McNary Act "to study the effects of laws, methods, and practices upon forest perpetuation."[15] In 1935, this Act funded Fairchild to thoroughly examine this subject and issue another report.[16] The report concluded that the burdensome effect of the property tax was a serious or insurmountable handicap to forest perpetuation in private ownership (the "Fairchild Report").[17] Fairchild succeeded in pointing out that the difference in timing between the payment of ad valorem property taxes and the receipt of income from timber land caused a time bias, effectively inducing timber owners to liquidate their investments prematurely, therefore, shortening production rotations.[18] Fairchild also observed that the public recognized the need for the protection that forests provide against floods, erosion, pollution and scenic spoliation.[19] He concluded that while these are vitally important from the public point of view, they were less important from the point of view of the private owner, as "the public interest requires not only less severe cutting, but also as a rule, more expensive cultural operations and methods of cutting."[20]

The report determined ad valorem property taxation of forest land resulted in deforestation, shorter timber stand rotations, and a conversion of use coinciding with the growth of suburban America. The ad valorem taxation method encouraged both residential land development and the

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10. *See generally* Steven A. Daugherty, *The Unfulfilled Promise of an end to Timber Dominance on the Tongass: Forest Service Implementation of the Tongass Timber Reform Act*, 24 ENVTL. L. 1573, 1600 n.145 (1994) (illustrating the Forest Service's prescription of a rotation age of approximately 100 years for timber production).

11. *See* FRED ROGERS FAIRCHILD, FOREST TAXATION IN THE UNITED STATES (U.S. Dep't of Agric. Misc. Pub. No. 218, 7 (Oct. 1935); Richard W. Trestrail, *Forests and the Property Tax - Unsound Accepted Theory*, 22 NAT'L TAX J. 347, 349 (1969).

12. THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 299, 323-25, 408-27, 431-35 (reintroduced by Elting E. Morison, Da Capo Press, Inc. 1985).

13. *See* FAIRCHILD, *supra* note 11, at 4.

14. *See* FAIRCHILD, *supra* note 11.

15. *See id.* at 5 (quoting from § 3 of the Clarke-McNary Act).

16. See id.

17. *See id.* at 6-10.

18. *See id.* at 7.

19 *See id.*

20. *See id.*

creation of recreational subdivisions, greatly increasing the raw land's value regardless of whether productive forests existed thereon.[21] The pressures of suburban development caused forest owners to be unable to justify growing timber under the resulting ad valorem tax burden.[22]

As Fairchild observed, it was not within the public interest to penalize forest owners.[23] Most of the states realized that to strive for the public policy goal of forest perpetuation, the ad valorem tax system had to be modified to tax forest land at less than full market value.[24] These special tax laws were slow in coming because state constitutions had to be changed in order to accomplish a different method of taxation.[25] State legislatures did not pass the majority of state forest incentive tax laws until the 1960's and 1970's.[26] Now, forty-seven states[27] have carved out exceptions to traditional ad valorem taxation of forest lands in order to induce both timber production and encourage the many non-timber related benefits that forests provide to the public.[28]

II. EQUAL PROTECTION CLAUSE AND PROPERTY TAXES

A. *Application to Property Taxes*

The last presidential election gave Americans a lesson in federal constitutional equal protection.[29] The equal protection clauses contained in the federal and in most state constitutions also apply to state property taxes. "Perhaps the most widely accepted principle of equity in taxation is that people in equal positions should be treated equally."[30] This principle is termed "horizontal equity".[31] Historically, the courts have left a determination of fairness in taxation in the province of state legislatures.[32] "[A] large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what

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21. *See* Siegel and Kerr, *supra* note 4, at 36.
22. *See id.*
23. *See* FAIRCHILD, *supra* note 11. at 7.
24. *See* Siegel and Kerr, *supra* note 4, at 38.
25. *See id.*
26. *See id.* at 63.
27. *See infra,* Table I.
28. *See id.*
29. *See generally* Gore v. Bush, 121 S.Ct. 525, 530, 532 (2000) (holding that (1) having once granted the right to vote on equal terms, the state may not, under the Equal Protection Clause of the U.S. Constitution, value one person's vote over that of another by later arbitrary and disparate treatment, and (2) when state courts order statewide recounts in Presidential election, equal protection requires that there be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied).
30. *See* John A. Miller, *Rationalizing Injustice: The Supreme Court and the Property Tax*, 22 HOFSTRA L. REV. 79, 125 (1993).
31. *See id.*
32. *See* William C. Cohen, *State Law is Equality Clothing: A Comment on Allegheny Pittsburgh Coal Company v. County Commission*, 38 UCLA L. REV. 87, 99 (1990)

measures are necessary for the protection of such interests."[33] Parties have challenged perceived unjust property taxes by bringing Equal Protection cases.

B. *The Ad Valorem Tax System*

To review the constitutional challenges to property taxes as they apply to forest land taxation, one must start with a closer inspection of the ad valorem taxation system. In a theoretically perfect ad valorem taxation system, a person who owns land served by the community pays taxes to the community based on the value of the land owned.[34] In theory, those who own the most valuable property pay the most tax.[35]

The ad valorem taxation is a two part process first establishing the value and secondly applying a tax rate expressed in either "mils"[36] or cents per hundred dollars assessed value to arrive at the imposed tax. "Traditionally, the base against which the rate is levied is the fair market value of the property subject to the tax."[37]

Fair market value for ad valorem taxation purposes requires a determination of the property's highest and best use.[38] Ensuring a high quality valuation system demands highly skilled and professional staff.[39] Assessing forest land requires highly specialized appraisal skills requiring a knowledge of land sales, timber markets, and timber measurement techniques. Often the valuation system applied by the taxing authority indicates that the property's current use as forest land is not the highest and best use. This gives rise to the forest owner's perception that forest land assessors are treating them unfairly. Further, there is an inherent problem in valuing property that has not been subject to a recent arm's length sale.[40]

C. *Rational Basis Standard*

The level of subjectivity of the local assessor has created numerous constitutional challenges that have proceeded through the courts all the way to the Supreme Court of the United States.

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33. Lawton v. Steele, 152 U.S. 133, 136 (1894).

34. James S. Wershow & Edward S. Schwartz, *Ad Valorem Assessments in Florida - Recent Developments*, 36 U. MIAMI L. REV. 67, 67 (1981).

35. *Id.*

36. Miller, *supra* note 30, at 84.

37. *Id.*

38. *See* William C. Unkel & Dean Cromwell, *California's Timber Yield Tax*, 6 ECOLOGY L.Q. 831, 832 (1978).

39. *See generally* INT'L ASS'N OF ASSESSING OFFICERS, STANDARD ON PROPERTY TAX POLICY (1997), at http:www.iaao.org (representing a consensus in the assessing profession and the objective of these standards is to provide a systematic means by which concerned assessing officers can improve and standardize the operation of their offices).

40. Miller, *supra* note 30, at 85.

In *Cumberland Coal Co. v. Bd. of Revision*,[41] the Supreme Court found that the local assessor assumed that all coal properties in the town should be taxed at the same rate, regardless of remoteness or accessibility of the parcel, costs of the operation of extracting the coal or the availability of transportation.[42] The Court found this over-simplified subjective approach was an intentional and systemic under valuation, which, if proven, violates Federal Equal Protection.[43] The Court held a legislature is not bound to tax every member or no member of a class. It may make distinctions of degree when it has a rational basis for that distinction. When subjected to judicial scrutiny, the Court must be presumed to rest on a rational basis if there is any conceivable state of facts that would support it.[44] We call this the "rational basis" Equal Protection test.

For over fifty-five years, the Supreme Court of the United States consistently adhered to the deferential rational basis review in tax cases that did not require "heightened scrutiny," that is, unless the taxation scheme was "palpably arbitrary" or "invidious."[45] This heightened scrutiny shifts the burden to the state to prove a compelling state interest if a "suspect classification" exists or the law impinges on a "fundamental interest."[46]

Then, in 1989, the Supreme Court of the United States decided the *Allegheny* case, which held that a West Virginia tax assessor's practices violated equal protection because certain properties received dramatically higher assessments than neighboring "comparable properties."[47] The Court found that the county assessor determined the appraised value of the coal company's properties relying heavily on recent sale prices of the coal company's properties which resulted in assessments thirty-five times higher than neighboring "comps"[48] which had not generally been tested for coal.[49] Additionally, the Court found that even though the similarly situated properties were subjected to regular ten percent incremental increases in assessed valuation, it would have taken 500 years to equalize assessments between the coal company's properties and neighboring lands.[50] The *Allegheny* Court implied that the Webster County assessor's actions would not be subjected to constitutional review if he

41. 284 U.S. 23 (1931).
42. *Cumberland Coal. Co.*, 284 U.S. at 24.
43. *Id.* at 28.
44. *Id.*
45. *See* Robert Jerome Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261, 284-85 n.144.
46. *See id.* at 278 nn. 99-103.
47. Allegheny Pitt. Coal Co. v. County Comm'n, 488 U.S. 336, 342-43 (1989).
48. "Comps" is a term of art referring to comparable properties used to compare the subject tax parcel in order to prove or disapprove valuation fairness.
49. *See Allegheny*, 488 U.S. at 338, 340.
50. *See id.* at 341-42.

had followed the state guidelines and based all coal land assessments on a "least valuable seam of mineral coal" standard.[51]

The *Allegheny* case called into question the ad valorem taxation system in general and the special exception statutes that allowed forest owners to elect to assess their forest properties based on methods other than fair market value.[52] We did not have to wait long to find out if the Supreme Court would throw out the rational basis review of tax statutes from the *Cumberland Coal* case. The Supreme Court issued its decision in *Nordingler*[53] in 1992, whereby the Court concluded that the acquisition cost assessment scheme of California's Proposition 13 has a rational basis, and thus did not violate the equal protection clause.[54] *Nordingler* distinguished the *Allegheny* decision because in *Allegheny* an individual local assessor who was not following state law caused the violation of the equal protection law, while Proposition 13 is a statutory scheme the voters of the State of California established.[55]

D. *Forest Land Tax Statutes Challenges*

The new forest land special tax classification laws do not appear to apply the heightened standard of equal protection that was a concern after the *Allegheny* decision. Before *Allegheny*, one state court using the rational basis standard, held that challenging the valuation of timber land for tax purposes required no judicial interference unless fraud or flagrantly excessive valuations showed an intention to discriminate.[56]

In the 1969 class action suit *Weissinger v. White*, the Eleventh Circuit found an Alabama state statute unconstitutional because the ad valorem assessment rates ranged from nine to thirty percent.[57] This case best illustrates the effects of rational basis equal protection on the changing legal landscape in the field of forest land taxation.[58] As a result, the legislature passed Amendment 373 to the Alabama Constitution which created four classes of property for taxation purposes.[59] Class Three in the scheme was farm, timber, residential and historical property. In an attempt to further subdivide Class Three, the amendment treated farm and timber property separate from residential and historic land.[60] In a follow-up case brought to the Eleventh Circuit Court of Appeals, the court held that Alabama was justified in the disparate treatment of one-half of the

51. *See* Glennon, *supra* note 44, at 292 n.207.
52. *See id.* at 304-05 n.265.
53. Nordingler v. Hahn, 505 U.S. 1 (1992).
54. *See id.* at 28.
55. *See* Erin A. O'Hara & William R. Dougan, *Redistribution through Discriminatory Taxes: A Contractarian Explanation of the Role of Courts*, 6 GEO. MASON L. REV. 869, 907-08 (1998).
56. *See* Powell v. Kelly, 223 So. 2d 305, 307 (Fla. 1969).
57. Weissinger v. White, 733 F.2d 802, 804, (11th Cir. 1984).
58. *See id.*
59. *See id.*
60. *See id.* at 805.

Class Three property for two reasons: (1) individual assessment of income producing property was not administratively feasible; and (2) the state had a special interest in preserving farm and timber land in an attempt to perpetuate certain desirable uses of its land in the face of economic pressures to convert the property to more lucrative pursuits.[61] The court concluded that any disparity that is rationally related to a permissible state purpose would pass the test of constitutionality.[62] The Alabama case is consistent with the often-articulated proposition that the Equal Protection Clause does not preclude states from creating different statutory classifications.[63]

In 1997, the Mississippi Supreme Court held that a forest owner who claimed to have devoted forty-seven forested acres near downtown Madison to timber use but had not actually prepared the property for planting was entitled to receive agricultural use valuation for the property.[64] As a result, the forest owner successfully challenged a revaluation to $2,525,000 for tax purposes and received an assessment consistent with her use of the land as forest land.[65]

In 2000, the Supreme Court of Alabama held that the valuation based on a "current use" as forest land as opposed to its fair and reasonable market value was not a constitutional violation even though the property had curbs and storm sewers the owner installed prior to the timber being cut. The special jury returned an interrogatory finding that on the tax record date in 1991 the property was "growing for sale timber and forest products."[66] The Alabama Court found that using the property as a forest on the tax date was all that mattered and the value of the surrounding property was immaterial.[67]

E. *Future Challenges*

These cases generally indicate property tax laws do not violate Equal Protection, including forest land incentive statutes. However, if there is gross discrimination within a class or if a fundamental interest is impinged upon, court may invoke equal protection. The author found only one state court decision holding that the statute taxing agriculture and timber land by "current use" is unconstitutional.[68]

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61. *See id.* at 806.
62. *See id.* at 806-07.
63. *See id.* at 805-06.
64. Madison County v. Lenoir, 695 So.2d 596, 596-97, 600 (1997).
65. *See Madison Co.*, at 596, 597, 600.
66. *See* Delaney's, Inc. & Springdale Stores, Inc. v. Ala., 2000 Ala. LEXIS 401, *11-12 (2000).
67. *See id.*
68. *See* Ark. Pub. Serv. Comm'n v. Pulaski County Bd. Of Equalization, 582 S.W.2d 942, 950 (1979).

III. YIELD TAX

A. *New Taxation Models*

Forest owners have unsuccessfully challenged the ad valorem tax system on Equal Protection grounds. Despite this failure, a general understanding has developed that disincentives inherent in an ad valorem tax system were not meeting the public policy goals to encourage green space and forest land. This realization led to a borrowing of the European model whereby countries tax forest property based upon yields, not fair market values.[69]

Prior to 1976, California's forest tax scheme was such a confused mess that three studies were conducted examining whether a new system could effectively replace the ad valorem tax system.[70] The California studies supported a yield tax as a form of timber land taxation for three reasons: (1) the yield tax would not affect timber management decisions as much as ad valorem taxes, including not penalizing owners who did not commercially harvest their trees; (2) the yield tax would correct major inequities in pre-Forest Tax Reform Act (FTRA) system; and, (3) collection and distribution at the state level could dispel local concerns over loss of income because the design of FTRA was revenue neutral.[71] California also had to pass a Constitutional Amendment before enacting FTRA.[72]

B. *Severance and Productivity Taxes*

Yield taxes come in two forms: severance and productivity taxes. States charge severance taxes as either a percent of the cut timber sales price or a tax per unit of harvested wood fiber in lieu of annual property taxes.[73] Severance taxes have the advantages of timing tax payments with harvest receipts and collecting the greatest amount from those with the greatest incomes from their forest lands.

The second form of yield taxes is a productivity tax. The hypothetical value of the land, as calculated by its expected future yield, forms the basis for productivity taxes. Productivity taxes are sometimes called "current use" taxes as they use estimated incomes from the property based on its current use as a forest.[74] Productivity taxes are also commonly used to tax agricultural lands which have many of the same public policy objectives as forest tax laws, such as to encourage agricultural

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69. *See* William C. Unkel & Dean Cromwell, *California's Timber Yield Tax*, 6 ECOLOGY L.Q. 831, 839 (1978).

70. *See id.*

71. *See id.* at 839; *see generally* Forest Tax Reform Act, ch. 176, 1976 Cal. Legis. Serv. 373-420 (1976) (codified as amended at CAL. REV. & TAX CODE §§ 431-37 (Deering 2000)).

72. *See id.* at 842.

73. *See infra* Table I.

74. *See Ark. Pub. Serv. Comm'n*, 582 S.W.2d at 948.

production and preserve "green belts" surrounding urban areas.[75] Soil productivity and capability form the basis of productivity taxes. These concepts are difficult to apply in practice since the assessor requires a great deal of knowledge in order to ascertain land values. Many states have elected to create forest land valuation matrixes[76] that state agencies developed to establish valuations by regions and by soil type or site index. In theory, productivity taxes incentivize the most productive use of forest lands provided the productivity taxes do not approach the level of the ad valorem taxes resulting in voluntary conversions.

C. *Green Belt Areas*

Many states have used yield taxes as a way to incentivize preservation of green space. Whether the states term the statutory scheme as open space, green belt space, vegetated filter strips, recreational open land, or forest land preserve areas, it recognizes the non-timber values many owners associate with owing their land. These statutory schemes do not penalize the land owners or forest owners who value wildlife, recreation, and aesthetic appreciation more than timber production. They may opt into the favorable tax schemes and enjoy the tax benefits that flow from them. Otherwise, the same ad valorem tax pressures would subject these owners to similar pressures as the forest owner whose primary objective is timber production. The states tax these properties based upon a current use theory. The state assumes the owner holds this property for timber production purposes; therefore, whether or not the owner intends to someday produce timber off the property, the state incentivizes them to keep it as forest land and to manage it for future timber and non-timber benefits. The net effect to the forest owner is that he does not have to pay potentially higher taxes based upon commercial and residential development around the property. The cases cited in the previous section demonstrate that courts have upheld this strongly indicated public policy which the state statutory schemes have expressed.[77]

IV. BALANCING STATE PUBLIC POLICY WITH LOCAL CONTROLS

A. *Owner Option*

Rather than mandate stewardship responsibilities upon every forest owner within the state, most states have provided the forest owner with the option of enrolling their property within the tax incentive program. The forest owner may opt for this voluntary election creating the classic

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75. *See, e.g.*, N.Y. Agric. & Mkts. Law §§ 300, 304(1) (2000).

76. A central state taxing authority which establishes values per acre for lands in different counties or regions using detailed soil maps, agricultural or timber product sale information, and other relevant, objective information usually sets up matrixes.

77. *See* discussion of Madison County v. Lenoir, 695 So.2d 596 (1997) and Delaney's, Inc. & Springdale Stores, Inc. v. Ala., 2000 Ala. LEXIS 401 (2000) *infra* Part II. D.

quid pro quo whereby the forest owner receives a lower tax burden in exchange for good forest stewardship.

B. *Management Plans*

Many states offering forest land tax incentives have a requirement that land owners must prepare a management plan in order to be qualified to obtain the special tax benefits. Management plans help land owners think through the issues confronting them as stewards of the land. Consulting foresters will make recommendations within a management plan as to wildlife enhancements and/or aesthetic appreciation strategies. The silvacultural principles, which are now well established, are not generally known to the average forest owner unless the forest owner is encouraged to obtain professional forester advice on how to manage the land in order to gain the benefit of the tax incentives. However, the level of plan requirements vary greatly from state to state. Compare Idaho,[78] which merely requires a general statement of eventual timber harvest intention, to New York, which requires detailed management plans and the forest owner's active participation while the property is enrolled in the program.[79]

C. *Time Commitment*

At the outset, forest owners in most states have to make a decision at the outset regarding their willingness to participate in good forest stewardship practiced for an extended period of time in exchange for reduced property taxes under the various forestry incentive laws. Most states express this commitment in terms of a minimum enrollment period.[80] By making the enrollment optional, states have essentially given the forest owner a choice between choosing ad valorem taxation based on the highest and best use of the property or choosing tax incentivized forest ownership.

A few states have mandatory participation of all forest owners; therefore, all forest owners receive forest tax incentives. Some states, such as California, have required forest commitments in what is called a "Timberland Preserve Zone".[81] Forest owners in California who are not in the mandatory Timberland Preservation Zone can apply for benefits and tax incentives but must meet three state mandated criteria. The state also allows local communities to add two optional criteria for owners who wish to apply, involving minimum acreage and minimum site character-

78. IDAHO CODE §63-1701(Michie 2000).

79. N.Y. REAL PROPERTY TAX, §480(a) (2000). *See generally* New York Dep't of Environmental Conservation Form No. 81-06-5(6/89)-90 "Certificate Of Approval" (conditioning approval and continued eligibility upon the work schedule listed on the form).

80. *See infra* Table I for states that have minimum enrollment periods.

81. Unkel, *supra* note 67, at 848.

istics.[82] Note, California does not permit any additional criteria for local government permissive granting of timber land preservation zone classification.[83]

D. *Acreage Requirement*

Many states have maximum or minimum acreages that are eligible to participate in the forest incentive tax program of that state.[84] Minimum acreage requirements allow each state to establish its public policy regarding what qualifies as forest land in its state. States with low minimum acreages do not appear to be concerned with further fragmentation of the timber land. Presumably, states with high minimum acreages have determined that not all forest land in the state is eligible for tax incentives, or they are providing a deterrent to fragmentation. States with maximum acreage requirements as part of their forest land tax incentive schemes appear to recognize that owners of large tracks of timber land are less likely to need or want state tax incentives to apply to their vast holdings with the co-commitments to management plans and yield taxes.

E. *Change of Use Penalties*

Many states have penalties for converting forest lands to other uses.[85] Some states call these penalties "rollback penalties," other states refer to them as "recapture penalties". At least nineteen states have no change of use penalty at all.[86] New Jersey has a short two year rollback[87] while Pennsylvania has a seven year rollback.[88] Meanwhile, New York appears to have the most severe penalties as it has a ten year rollback feature, plus interest.[89] If it is a full removal of the property from the RPTL Section 480(a) program, the New York land owner pays an additional penalty equal to two and one-half times the rollback amount.[90] If the land owner attempts to withdraw a portion of the qualified property, the State of New York exacts a penalty of five times the rollback figure.[91] This amounts to a penalty of fifty times the current year's tax savings! Other states having relatively heavy penalties include Hawaii, Washington, Pennsylvania, Vermont and California.[92] In states which have voluntary participation in the forest incentive programs, the level of participation is often correlated to the penalty feature alone. For instance, Louisiana has

82. *See id.* at 853.
83. *See id.*
84. *See infra* Table I.
85. *See infra* Table I.
86. *See infra* Table I.
87. N.J. STAT. ANN. § 54:4-23.8 (West 2000).
88. 72 PA. CONS. STAT. ANN. § 5490.5a (West 2000).
89. N.Y. REAL PROP. TAX LAW § 480(a) (McKinney 2000).
90. *Id.*
91. *Id.*
92. *See* Siegel & Kerr, *supra* note 4, at 62.

eighty percent and Florida has one hundred percent participation.[93] New York, meanwhile, has only four percent of the eligible land enrolled in the RPTL 480(a) Program.[94]

F. *Parcel Eligibility*

Most states try to balance state public policy as expressed in its forest taxation law against local interest in maintaining and preserving income and other benefits derived through the property tax system. States that have forest incentive laws often establish some local control, such as forcing the land owner to register the property on an annual basis[95] or requiring the forest land owner to petition local government to include timber land for special zoning designation.[96] By establishing state standards for which properties qualify, the state effectively overcomes local resistance to "down zoning"[97] or removal of property from local tax rolls completely, resulting in tax shifts to remaining property from those owners qualifying for the forest land tax incentives.[98]

Some states have built provisions into their forest tax incentive laws to help the local communities. For instance, Alabama has a yield tax premium of approximately fifty percent on both hardwood and softwood log sales exported from the state.[99] This disincentive to perform value added processing of the raw timber outside the state helps the local communities retain jobs and is an attempt to stem the tide of rising log exports that many states are experiencing. Other states, such as Arkansas, have imposed a $.15 per acre surtax on all forest land to help defray the costs of fire protection of those timber stands.[100] Courts have upheld the cost of fire protection as a property tax component with respect to forest land after a court challenge.[101] Michigan and Wisconsin have a requirement that in order to be eligible for tax incentives, property cannot be posted, which is one reason cited for low enrollment in those states [102]

G. *School Taxes*

Traditionally, most school districts in this country rely either solely or in large part upon property taxes generated within the district bounda-

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93. *Id.*

94. Joint Report of the New York State Dept. of Env't Conservation and Bd. Of Equalization and Assessment on The Forest Tax Laws (Sections 480 & 480a of the Real Property Tax Law) 2 (Dec. 1993) [hereinafter Joint Report, The Forest Tax Laws].

95. *See id.* at 2.

96. *See* Unkel, *supra* note 67, at 853.

97. *See id.*

98. *See* JOINT REPORT, THE FOREST TAX LAWS, *supra* note 92, at 4.

99. ALA. CODE § 9-13-82 (2000).

100. ARK. CODE ANN. §26-61-103 (Michie 2000).

101. *See generally* State v. Pape, 174 P. 468 (1918); Chambers v. McCollum, 272 P. 707 (1928).

102. *See* Siegel & Kerr, *supra* note 4, at 63.

ries.[103] A great deal of tension has developed at the local level between school districts who rely on property tax revenues as their sole source of funding and forest owners who are raising trees that will never attend the local schools. A series of cases that are unrelated to forest tax incentives may resolve this tension and should have a profound impact on how states fund local school districts. Essentially, three "waves" of cases have swept across the United States, challenging the local funding of schools through levies on local real property tax base.[104] The first wave challenged the state statutes based upon an equal protection theory that the poorer districts did not fair equally compared to the more wealthy districts because they had less tax base to support their educational programs. The Supreme Court rejected this view that wealth was a suspect classification because education was not a fundamental interest.[105] The second wave of cases found that, although the Federal Constitution did not protect education, certain State Constitutions' equal protection clauses specifically mention education; therefore, the local school districts across the state were entitled to be funded on an equal basis.[106] The third wave of cases all rely solely on the education clause of state constitutions. These cases have held that the state has been responsible through its actions for a substantial portion of the under funding of poorer districts resulting in a constitutional violation.[107]

These new school tax cases challenging local taxation should be a great relief to forest land owners. Now, through centralized state school funding, the states can equitably distribute property tax levies throughout the state. Forest owners will pay their fair share of the school taxes regardless of what percent of the local town's tax base the forest land represents. School districts in poor rural areas will be assured that their education funding will be equal to the wealthier districts within the state regardless of property tax base and receipts of yield taxes from forest lands. It is fortunate that trees versus school children will no longer be a source of local tension.

CONCLUSION

Essentially, there are three methods to choose from to encourage private forest ownership: regulations, incentives, and voluntary management.[108] All three methods are blended together in the various state laws to advance public policy objectives. As the Fairchild Report stated, "[t]he ideal method of taxing forests is that which will require a just contribu-

103. *See generally* Campaign for Fiscal Equity v. State of New York, 2001 N.Y. Misc. LEXIS 1, 36-40 (2001) (discussing New York State's school aid distribution system).

104. *Campaign for Fiscal Equity*, 2001 N.Y. Misc. LEXIS at 9-17.

105. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 18 (1973).

106. *See generally* Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

107. *See Campaign for Fiscal Equity*, 2001 N.Y. Misc. LEXIS at 14-17.

108. *See* Lundmark, *supra* note 2, at 792.

tion from forest owners, while being of such form as will not place a special obstacle (beyond what any just tax must impose) in the way of best use of the forests and the forest lands from the viewpoint of the public interest."[109]

There is probably no such thing as an ideal law, but a good forest taxation law should include four essential elements: (1) the law should base all assessments upon the productive capability of the land; (2) the laws should compute the assessment values on a statewide basis; (3) the state law should include some rollback taxes or other penalties so that the properties do not get prematurely withdrawn; and, (4) the statutes should protect local public interest without sacrificing too much state control over the process to ensure equity and fairness.[110]

The last century has witnessed a tax revolt and constitutional upheaval in forest taxation. The individual forest owner now has an incentive to be a forest steward who is managing his forest for future generations to enjoy the many resulting benefits.

109. FAIRCHILD, *supra* note 11, at 9-10.
110. *See* Siegel & Kerr, *supra* note 4, at 63.

TABLE I

STATE	FOREST CLASS OR CURRENT USE YES/NO	SEVERANCE TAX UNIT OR % NO	FOREST OWNER OPTION YES/NO	MANAGEMENT PLAN REQUURENEBT YES/NO	MINIMUM TERM # OF YRS/NO	ACREAGE REQUIREMENT MAX. OR MIN./NO	CHANGE USE PENALTY YES/NO
ALABAMA	YES	UNIT	YES	NO	NO	NO	YES
ALASKA	NO	NO	NO	NO	NO	NO	NO
ARIZONA	NO	NO	NO	NO	NO	NO	NO
ARKANSAS	YES	UNIT	NO	NO	NO	NO	NO
CALIFORNIA	YES	2.9%	YES	NO	NO	NO.	YES
COLORADO	YES	NO	YES	NO	NO	• 40 AC	NO
CONNECTICUT	YES	2-10%	YES	NO	10 YR	•25 AC	YES
DELAWARE	YES	NO	YES	YES	2YR	•10 AC	YES
FLORIDA	YES	NO	YES	NO	NO	NO	NO
GEORGIA	YES	UNIT	YES	NO	10 YR	•10•2000	YES
HAWAII	YES	NO	YES	YES	20 YR	• 10 AC.	NO
IDAHO	YES	3%	YES	YES	10 YR	•5•5000	YES
ILLINOIS	YES	4%	YES	YES	2YR	NO	NO
INDIANA	YES	NO	YES	NO	NO	•10 AC.	NO
IOWA	YES	NO	YES	NO	8 YR	•2 AC.	YES
KANSAS	YES	NO	NO	NO	NO	•10 AC	YES
KENTUCKY	YES	NO	NO	NO	NO	•10 AC	NO
LOUSIANA	YES	2.5-5%	YES	YES	NO	•3 AC	NO
MAINE	YES	NO	YES	YES	10 YR	•10 AC	YES
MARYLAND	YES	NO	YES	YES	NO	•5 AC	NO
MASSACHUSETT	YES	5%	YES	YES	10 YR	•10 AC	YES
MICHIGAN	YES	5%	YES	YES	NO	•20 AC	YES
MINNESOTA	YES	2.0-10%	YES	YES	6 YR	•5 AC	YES
MISSISSIPPI	YES	UNIT	NO	NO	NO	NO	NO
MISSOURI	YES	6%	YES	NO	NO	•20 AC	YES
MONTANA	YES	UNIT	NO	NO	NO	•15 AC	NO
NEBRASKA	YES	NO	NO	NO	NO	NO	NO
NEVADA	YES	NO	YES	NO	3 YR	•7 AC	YES
NEW	YES	10%	YES	YES	NO	•10 AC	YES
NEW JERSEY	YES	NO	YES	YES	2 YR	•5 AC	YES
NEW MEXICO	YES	1/8TH%	YES	NO	1 YR	•1 AC	NO
NEW YORK	YES	6%	YES	YES	10 YR	•50 AC	YES
NORTH	YES	6%	YES	YES	4 YR	•20 AC	YES
NORTH DAKOTA	YES	NO	YES	YES	5 YR	•5 AC	NO
OHIO	YES	NO	YES	YES	3 YR	•10 AC	YES
OKLAHOMA	YES	NO	NO	YES	NO	NO	NO
OREGON	YES	UNIT	YES	YES	NO	•10 AC	YES
PENNSYLVANIA	YES	NO	YES	NO	NO	•10 AC	YES
RHODE ISLAND	YES	NO	YES	YES	NO	•10 AC	YES
SOUTH	YES	UNIT	YES	NO	NO	•5 AC	YES
SOUTH DAKOTA	NO	NO	NO	NO	NO	NO	NO
TENNESSEE	YES	NO	YES	YES	NO	•15 AC	YES
TEXAS	YES	NO	YES	NO	5 YR	NO	YES
UTAH	YES	NO	YES	NO	NO	•10 AC	YES
VERMONT	YES	NO	YES	YES	10 YR	•5 AC	YES
VIRGINIA	YES	UNIT	YES	YES	NO	•25 AC	YES
WASHINGTON	YES	5%	YES	YES	10 YR	•20 AC	YES
WEST VIRGINIA	YES	3.22%	YES	YES	5 YR	•10 AC	YES
WISCONSIN	YES	5%	YES	YES	25 YR	•10 AC	YES
WYOMING	YES	NO	NO	NO	2 YR	NO	NO

MINE SAFETY AND HEALTH ADMINISTRATION SPECIAL INVESTIGATIONS—A PRIMER

CHARLES W. NEWCOM*

INTRODUCTION

This article is designed to provide attorneys representing mining companies and contractors doing work on mine property with a primer for dealing with Mine Safety and Health Administration ("MSHA")[1] special investigations. MSHA special investigations pose particularly complex and sensitive problems for company counsel. Such an investigation may give rise not only to increased civil, or even criminal, liability for the company, but also civil and criminal liability for individual managers.

It is also important to note that, although not addressed separately in this article, the concepts addressed herein are, in large measure, equally applicable to accident investigations. MSHA regulations provide that certain events occurring on mine property including, among other events, the death of an individual or the injury to an individual "which has a reasonable potential to cause death" are to be immediately reported to MSHA.[2] As one can appreciate, an accident with serious injuries, or a fatality, is a situation where potential liability is great and these circumstances almost always lead to serious citations and a later special investigation.[3]

Special investigations are a "preliminary" which may lead to greater corporate liability, individual managers' civil liability, and, in extreme circumstances of conscious misconduct, criminal liability for both the

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1. The Mine Safety and Health Administration is a part of the United States Department of Labor and is charged with enforcement of the Federal Mine Safety and Health Act of 1977. Federal Mine Safety and Health Act of 1977, Pub.L. No. 95-164 § 302, 91 Stat. 1290 (codified at 29 U.S.C. § 557(a) (1977)).

2. *See generally* 30 C.F.R. Part 50 (2000). An "accident" is to be immediately reported to MSHA by telephone. 30 C.F.R. § 50.10. It is then at MSHA's discretion whether or not to conduct an immediate on-site investigation. Particularly where a fatality or a serious, potentially disabling, injury has occurred, MSHA virtually always conducts an immediate on-site investigation. The accident investigation will usually begin the next or second working day after the accident, depending upon the proximity of MSHA offices to the mine site. 30 C.F.R. § 50.2 (h)(1-12) defines "accident" as one of twelve discrete events, including ten which do not necessarily involve any personal injury.

3. It is certainly prudent whenever an incident is immediately reported that company counsel be involved in assisting mine personnel in dealing with MSHA's accident investigation.

company and individuals. It is thus essential that mine operators proceed with great care as to any citation, or accident, which may lead to a special investigation.

I. MINE ACT LIABILITY

Liability for violations of the Federal Mine Safety and Health Act of 1977 ("the Mine Act")[4] can be significant. The Mine Act provides that each violation of an applicable regulation, or the Mine Act itself, may lead to a civil penalty against the mine operator.[5] The maximum for that civil penalty is currently $55,000.[6] While most citations have proposed penalties of a few hundred dollars and, on occasion, only $55.00,[7] those citations arising from a fatality, serious injury, or which are found to be caused by a high degree of negligence or an "unwarrantable failure" will often be assessed much closer to the maximum allowable penalty.

In addition to mine operator civil liability, the Mine Act also provides for corporate criminal liability[8] and, of particular significance here, civil and criminal liability for individual directors, officers, or agents of a corporate mine operator.[9] That liability allows for the same level of penalties against an individual as a corporate operator would face.

For civil liability to attach, a director, officer, or agent of a corporate mine operator must have "knowingly authorized, ordered, or carried out" an action or failure to act which would subject the corporate mine operator to a civil penalty.[10] This liability may arise for either a violation of a mandatory health or safety standard or any other provision of the Mine Act itself.[11]

In evaluating whether some action has been taken "knowingly," MSHA takes the position that it does not have to show "bad faith or evil

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4. Mineral Lands and Mining Act, 30 U.S.C. § 801 *et seq* (2000). For an overview of the Mine Act, *see, e.g.*, Stephan A. Bokat & Horace A. Thompson III, eds., OCCUPATIONAL SAFETY & HEALTH LAW, Chapter 26, "The Federal Mine Safety and Health Act of 1977" (The Bureau of National Affairs, Inc. and American Bar Association 1988).

5. 30 U.S.C. § 820(a) (2000).

6. *Id.* The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, § 535, 104 Stat. 890 (1990), *amended by,* Pub. L. No. 104-134, Title III § 31001(s)(1), 110 Stat. 1321-373 (1996) *and* Pub. L. No.105-362, Title XIII, § 1301(a), 112 Stat. 3293 (1998) (allowing for automatic periodic increases in civil penalties with inflation). Thus, the maximum civil penalty is presently set at $55,000. *See* 30 C.F.R. § 100.3(a) (2000).

7. MSHA Civil Penalty Regulations at 30 C.F.R. Part 100 (2000). *See also* 30 C.F.R. § 100.4(a) (allowing for a single penalty assessment of $55.00 for minor violations).

8. 30 U.S.C. § 820(d) and (f). It should be noted that by operation of 18 U.S.C. §§ 3571 and 3581, the maximum criminal fines may be as high as $500,000 for a corporation and $250,000 for an individual, depending upon the nature of violation involved.

9. 30 U.S.C. § 820(c).

10. *Id.*

11. *Id.*

purpose or criminal intent."[12] MSHA's position is that the term "knowingly" is to be defined as in contract law "where it means knowing or having reason to know [and that a] person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence."[13] Nevertheless, cases have consistently included the concept that before individual civil penalties can be issued, there must be some showing that the action of a director, officer, or agent of a corporation "involve[d] aggravated conduct, not ordinary negligence."[14] Under these cases, "knowing" conduct must involve more than a lapse in judgment or a loss in concentration.[15] Nevertheless, because the standard for individual civil liability encompasses not only what the individual knew but also what the individual reasonably should have known, caution dictates that whenever a violation of the Mine Act has been alleged by MSHA and a special investigation follows, the matter must be treated with the utmost care and seriousness.

The Mine Act also provides for criminal liability for the operator of a mine and any director, officer, or agent of a corporate operator where the mine operator, director, officer, or agent "willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply" with certain orders issued under the Mine Act.[16] Criminal liability may arise where action occurs which involves "intentional disobedience" or "reckless disregard" of a mandatory health or safety standard or applicable provisions of the Mine Act.[17] Reckless disregard has been defined as "closing of the eyes to or deliberate indifference toward" requirements which the defendant "should have known and had reason to know" about at the time of the violation.[18]

Whether evaluating the risks of civil or criminal liability, issues of intent and knowledge are central. Issues of intent usually, and necessarily, involve subjective evaluations. Whenever MSHA seeks to undertake

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12. MINE SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, MSHA HANDBOOK #PH97-I-3 4-xxxvi (1997). This Handbook is available on MSHA's website *at* http://www.msha.gov/.

13. *Id.*

14. *E.g.* MSHA v. Wyoming Fuel Co., 16 F.M.S.H.R.C. 1618, 1630 (1994)(*citing* MSHA v. Bethenergy Mines, Inc., 14 F.M.S.H.R.C. 1232, 1245 (1992)). *Accord* Freeman United Coal Mining Co. v. Federal Mine Safety and Health Review Comm'n, 108 F.3d 358, 363-364 (D.C. Cir. 1997).

15. *Id.*

16. 30 U.S.C. § 820(d). A violation of a standard is "willful" if done:

> [E]ither in intentional disobedience of the standard or in reckless disregard of its requirements. Reckless disregard means the closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard, which standard the defendant should have known and had reason to know at the time of the violation. The term willfully requires an affirmative act either of commission or omission, not merely the careless omission of a duty.

U.S. v. Jones, 735 F.2d 785, 789 n.6 (4th Cir.), *cert. denied*, 469 U.S. 918 (1984). *See also* U.S. v. Consolidation Coal Co., 504 F.2d 1330, 1335 (6th Cir. 1974).

17. *See Jones*, 735 F.2d at 789.

18. *Id.*

a special investigation, it is essential that in-house, or outside, counsel be involved in evaluating how to proceed. Even though mine management may feel it acted properly and in good faith, that will not be the end of the matter. The issue in a special investigation ultimately boils down to the conclusion reached by a special investigator and the investigator's superiors in the MSHA internal review chain as to whether any "knowing" or "willful" misconduct has occurred. In such circumstances, it is valuable, if not critical, that counsel be involved in assisting both the company and individual managers in the investigation. The investigation is essentially an adversarial proceeding, or certainly should be treated as such. Failure to take advantage of assistance of counsel may lead to an incomplete or misdirected defense of the company and/or an individual's position.

II. MSHA CRITERIA FOR A SPECIAL INVESTIGATION

MSHA's Special Investigations Procedures Handbook describes criteria for undertaking a special investigation.[19] The "special investigation" is the mechanism MSHA uses to evaluate whether to propose extraordinary penalties. It is important to note that the Mine Act does not reference "special investigations," and it contains no criteria for evaluating whether a special investigation is appropriate. MSHA will make an initial evaluation as to whether there is some basis for concluding a "knowing" or "willful" violation may have occurred. If that conclusion is "yes" or "maybe," a special investigation will follow.

Where there has been a mine accident, a complaint of possible advance notice of an inspection,[20] false reporting of information,[21] or misrepresentation regarding equipment's compliance with Mine Act requirements,[22] the circumstances will be evaluated to determine whether a special investigation is appropriate.[23]

Additionally, other citations issued to a mine operator, independent of these circumstances, will be evaluated. Particularly those citations issued along with an imminent danger closure order,[24] citations desig-

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19. *Supra* note 12, at 4-xxxvii.

20. Giving advance notice of an inspection may also lead to criminal sanctions. 30 U.S.C. § 820(e). Presumably that sanction would only apply to a government agent, not a mining company or one of its agents.

21. False statements, representations, or certifications may lead to criminal penalties. 30 U.S.C. § 820(f). This may apply to records required to be kept pursuant to MSHA regulations or to statements made in special investigations, among other things.

22. 30 U.S.C. § 820(h).

23. *Supra* note 12, at 4-xxxvii.

24. Imminent dangers may lead to an immediate, self-executing closure of the affected area of the mine. 30 U.S.C. § 817(a) (2000). Only persons needed to correct the danger may enter affected area. 30 U.S.C. § 817(a), as provided in 30 U.S.C. § 814(c) (2000). "Imminent danger" is defined at 30 U.S.C. § 802(j) (2000).

nated by an unwarrantable failure,[25] or citations which involve working in violation of an order of withdrawal[26] will draw specific focus in determining whether a special investigation should occur. While not all of these citations will lead to a special investigation, increasingly, in recent years, the norm is for these matters to lead to a special investigation.[27]

It should also be highlighted that MSHA is not precluded from conducting a special investigation into other alleged violations that fall outside these parameters. Moreover, it is not required to conduct a special investigation of every alleged violation of a mandatory health or safety standard or other provision of the Mine Act that meets these criteria. MSHA has a great deal of administrative discretion in determining which matters it will pursue to a special investigation.

III. THE SPECIAL INVESTIGATION

A. *Early Company Investigation*

Where an accident has occurred, and an attorney has participated in the accident investigation, a thorough factual investigation will be undertaken at the same time as MSHA's initial accident investigation. However, where the attorney has not participated in the accident investigation or, non-accident events have occurred which may give rise to a special investigation under MSHA's criteria, it is prudent to undertake an early factual investigation of the situation. Failure to do so may significantly limit the ability to mount a successful defense.

Depending upon the circumstances surrounding the citation and the availability of mine personnel, this early investigation may be conducted either through an on-site investigation by the attorney or by telephone in coordination with safety personnel and mine management. Particularly,

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25. The legal standard for an unwarrantable finding has long been set. The Senate Report to the Mine Act specifically approved a prior decision finding an unwarrantable failure under the predecessor of the Mine Act, the Coal Mine Safety and Health Act of 1969. *See* S. Rep. No. 181, at 32, *reprinted in* 1977 U.S.C.C.A.N. 3432, which cited with approval under Zeigler Coal Co., 84 I. D. 127, 135 (1977), 1 MSHC 1518, 1524 (IBMA No. 74-37, 1977) which stated:

> [T]hat an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care. The inspector's judgment in this regard must be based upon a thorough investigation and must be reasonable.

Decisions as to an unwarrantable failure necessarily involve multiple fact questions as to the judgment of supervisory personnel.

26. The Mine Act provides that withdrawal orders may be issued for failure to timely abate a citation, 30 U.S.C. § 814(b), repetitive, unwarrantable failure violations, 30 U.S.C. § 814(d), citations following a pattern of violation notice, 30 U.S.C. § 814(e), and for imminent danger situations, 30 U.S.C. § 817(a). Additionally, untrained miners are to be withdrawn from work until their training is completed. 30 U.S.C. § 814(g).

27. *See* MSHA Special Investigation Procedures, *supra* note 12, at 4-xxxvii-4-xxxix.

should cost be an issue, or if there are significant uncertainties as to whether a special investigation might occur, much can be done by telephone. Document collection can readily be coordinated and interviews can often be conducted by telephone, depending upon the nature of the situation.

Early investigation and evaluation is important, not only to begin making judgments as to approaches, but also to ensure information is not lost. MSHA's internal guidelines allow for at least thirty days for processing and evaluation as to whether a matter should be pursued for special investigation.[28] MSHA's Manual does not specify how soon an investigation should commence. In recent years, in view of the significant increase in the number of special investigations, it has been rare, at least in the western United States, for special investigations (especially in non-accident situations) to occur less than six months after a citation is issued. Nine to twelve months is probably a more common time period between issuance of a citation and MSHA's beginning special investigation interviews of managers. MSHA inspectors will have always made notes of their evaluation of a situation leading them to issue a citation. While some managers and safety representatives take notes during the course of inspections, many do not. Often the notes taken may not necessarily be very detailed. Even if the inspector noted concern about the situation at the time it was observed, the seriousness of the potential citation may not have been disclosed until the end of the inspection day, or perhaps even later. Even a week or two after a citation is issued, memories will have begun to fade. If fact gathering does not begin for several months, much information may be lost. Company personnel should have at least the broad outlines of their defense prepared before MSHA begins contacting the company or individual managers for interviews, which may not occur until months after the citation was issued.[29]

B. *Ethical Issues*

Since a special investigation necessarily involves not only determinations as to more serious corporate liability, but also decisions as to managers, ethical issues as to representation will often arise for counsel. The Code of Professional Responsibility mandates that lawyers not represent a client if the representation of that client is directly adverse to another client.[30] Moreover, since a corporate mine operator can only act

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28. *Supra* note 12, at 4-xxxviii.

29. MSHA regulations allow for a conference on citations to discuss the citation and the company's reasons for reducing the severity of the citations. Federal Mine Safety & Health Act 30 C.F.R. § 100.6(c) (2000). The conference must be requested within 10 days after the citation is issued. 30 C.F.R. § 100.6(b). Where a conference has occurred, added information will presumably have been collected. However, that may not necessarily have been done from the perspective of litigation defense.

30. Colorado Rules of Prof'l Conduct R. 1.7(a) (2000).

through its directors, officers, and agents a lawyer representing the corporation must carefully evaluate whether s/he can represent not only the corporation but also individuals.

Generally, counsel will begin this process representing a corporate client. A lawyer representing a corporate entity is obligated to proceed "as is reasonably necessary in the best interest" of the corporation in a situation where an officer, director, or agent is engaged in action that may give rise to a violation of law that might be attributable to the corporation.[31] Dual representation of directors, officers, or employees/agents is allowable depending upon the circumstances.[32] Assuming the situation is one in which counsel initially becomes involved on behalf of a corporate entity, it is ethically mandated that a judgment be made, and reevaluated on a ongoing basis, as to whether the lawyer can represent not only the corporate entity, but also individuals associated with the corporation.[33]

Determining whether multiple representation of both the corporation and one or more corporate agents can occur involves a fact intensive evaluation of a number of issues. Most prominent among these are judgments as to the potential culpability of the corporation, potential culpability of individual managers, corporate requirements, and allowable approaches as to indemnification of corporate agents. Additionally, judgments need to be made as to the potential for civil versus criminal liability, since it is doubtful that joint representation would ever be undertaken where it was thought there was a serious risk of criminal liability.

Other than noting the necessity for this evaluation and the broad requirements of the canons of ethics, no clear guideline can be provided. Counsel must review the applicable canons of ethics, company policies and practices, the facts of the particular citation(s), and make a judgment as to the appropriate approach for handling the particular representation. Certainly, if the circumstances are such that the corporation is considering discipline, if not discharge, of a manager involved in the events leading to the citation(s), joint representation will likely be inappropriate. In that situation, the corporation will likely be considering, if not pursuing, an argument that corporate negligence should be reduced, and thus the penalty lessened because of supervisory misconduct.[34] Also, an indi-

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31. Colorado Rules of Prof'l Conduct R. 1.13(b).

32. Colorado Rules of Prof'l Conduct R. 1.13(e).

33. Colorado Rules of Prof'l Conduct R. 1.13(a).

34. The efficacy of such an argument will be highly dependent on the facts of the particular situation. The Federal Mine Safety & Health Review Commission has ruled that where a mine operation is (a) prudent in selecting and training a foreman [or other manager], who had in the past exercised good judgment, and (b) has an adequate overall safety program, then a foreman's acting "aberrantly" and engaging in "wholly unforeseeable misconduct" will give rise to a defense which, if proved, can reduce the level of negligence attributable to the mine operator, and, thereby, reduce the civil penalty. MSHA v. Nacco Mining Co., 3 F.M.S.H.R.C. 848, 850 (1981). Recently, the Commission noted this defense "has been applied sparingly" and it refused to apply *Nacco* to reduce

vidual may for his/her personal reasons prefer separate representation and, depending upon the circumstances and corporate indemnification policies, the Company may be obligated to finance such a request.

I would also add a personal word regarding multiple representations based upon my own experience. If an initial decision in favor of joint representation later proves to be an error, the only "penalty" is that the lawyer will be obligated to withdraw, both from representing individuals and from representing the corporation on the particular matter at hand. There is no loss of privilege to communications occurring prior to the withdrawal from representation. Where corporate indemnification policies provide protection for the individual and there is no reason to expect the corporation may either wish to discipline a manager for actions taken or omitted or argue that the conduct of an individual officer, director, or agent was improper and cannot, or should not, be attributed to the corporation, my preference is to err on the side of joint representation. I say this even though this approach may later give rise to a necessary withdraw from all representation on the particular matter.

The reason for this approach is that, even at larger mines, the workforce tends to be close knit and first line supervisors often identify closely with their more senior managers and the mining company itself. If mine supervisors have separate representation from the corporation, it may ensure that a particular lawyer represents the company throughout the dispute to its resolution, but it will not necessarily serve the overall interests of the corporation in having an effective management team. If good managers have to find their own independent counsel, even if they are assisted in that by corporate counsel, it will necessarily foster some degree of "we" and "they" mentality which will not be productive, long-term, for the mine. Obviously, where it is known early in an investigation that a particular manager has engaged in plainly inappropriate conduct, not only will corporate counsel be unable to represent that individual, the attorney may also be involved in advising the corporation as to whether misconduct engaged in by the manager warrants demotion or even termination from employment. Where, however, as is most often the case, the worst that may be said about a manager is that a lapse in judgment or attention led to the circumstance now being specially investigated by MSHA, the overall interests of the corporation may best be served by "hanging together" rather than "hanging separately". In assessing the interests at play and applicable ethical standards, the potential advantages to the corporate client and its managers in a joint representation should be carefully evaluated, even if it leads to the lawyer's accepting some risk that if facts dramatically change, withdrawal from all representation in the matter at a later date might be required.

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the negligence of a mine operator and, thereby, vacate an unwarrantable failure finding. MSHA v. Capitol Cement Corp., 21 FMSHRC 883, 893-95 (1999).

Necessarily, judgments as to joint representation should only be considered by outside counsel. In-house attorneys actively involved in handling special investigations are in a different posture. Rarely, if ever, would in-house counsel be in a position where s/he would want to undertake representing not only the corporation but also individual officers, directors, or agents.

C. *A Special Investigation Checklist*

In preparing for a special investigation, counsel should evaluate a number of factors both before and during the investigation.

1. Issues of Representation

As described above, ethical issues must be addressed at the outset and as the matter progresses, in connection with any special investigation. A continuing evaluation of whether counsel can represent not only the mining company, but also individual supervisors must occur. It is also important to determine what representation role counsel will provide with respect to particular company witnesses. That, of course, will bear upon issues as to the applicability of attorney-client privilege to communications that occur in the interview process.

2. Witnesses

Information must be gathered as to the potential witnesses to the alleged violation. This may include both management and non-management employees. Depending upon the issues raised by the citation(s), it may be appropriate not only to interview personnel accompanying the inspector but also personnel working in the area during the shift when the citation was issued and personnel who may have worked in the area on one or more prior shifts. Additionally, where issues of equipment condition or maintenance are involved, it is likely that the maintenance personnel last involved with the equipment will have pertinent information to supplement the information equipment operators may have.

As a list of witnesses is developed, interviews should be conducted to determine what information each witness may have related to the circumstances surrounding the citation(s) at issue. As a part of this interview process, counsel should also be evaluating whether it will be appropriate to undertake representation of one or more individuals. Independent of representation issues, counsel should advise those witnesses of their rights vis-à-vis an MSHA special investigator in an interview.[35]

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35. Witnesses are not required to participate in an interview with a special investigator. If a witness does participate in an interview, it is certainly in the witness' interests to have the assistance of counsel. Without the assistance of someone familiar with the investigation process, and the litigation that may follow, the witness may not make a complete or clear defense of the situation.

It should also be added in regard to witnesses that when an MSHA special investigator contacts mine management about a special investigation, the investigator may be willing to disclose the names of those managers the investigator wishes to interview. The investigator will not disclose non-management interviewees. Moreover, some investigators will only disclose names of management witnesses after the investigator has first attempted to contact the company manager to determine whether the manager is willing to talk to the investigator without the assistance of counsel, or assistance of some other company representative.

3. Document Gathering

The range of potential documents will obviously depend upon the nature of the underlying citation. Categories which may be pursued, however, include (a) notes made by company personnel during the inspection leading to the citation, (b) notes made by the manager(s) working in the area where the citation was issued during the shift when the citation was issued and, often, prior shifts, (c) pre-shift and on-shift inspection records which may have been completed for the area where the citation arose or equipment in question was located, and (d) maintenance records for any equipment that may be involved in the citation.

It is critical that once documents are collected, they be retained. Independent of what decisions may be made with regard to personal interviews, company records may be subpoenaed if not voluntarily provided.[36]

4. Should the Individual Managers Submit to an Interview?

As information is gathered, a decision must be made about whether to advise a manager to be interviewed. The approach here will depend both upon the comfort level of the manager and the circumstances. Individual managers are not obligated to participate in an interview nor, for that matter, are hourly employees. A range of factors, including the apparent direction of the investigation, information that the witness may have, the witness' comfort level with the process, and the anticipated reaction of MSHA to a refusal to be interviewed, should be considered in addressing this issue. While not articulated by MSHA, my sense of the investigation process is that if an individual refuses to participate in an interview, MSHA will draw a negative inference from that refusal which may increase the risk of a penalty being proposed. That alone, however,

36. While no survey has been conducted, anecdotal information from discussing these issues with other practitioners would suggest to the author that most commonly, counsel representing mining companies, and managers, during special investigations provide the investigator with company records as requested by the investigator. Different issues as to access may arise in a situation in which an individual supervisor is asked to produce any notes which he may have made. Those issues should be addressed on a case by case basis.

should not lead a person to participate in an interview. Finally, it should be added that generally, though not always, if an individual is unwilling to be interviewed, that should lead to closer consideration of whether separate representation may be appropriate for that individual.

Before the witness actually meets with the MSHA investigator, the lawyer should also spend time preparing the witness for the interview. This will, in large measure, be comparable to preparing a witness for a deposition or trial testimony. Although this process is in many respects less formal than deposition or trial testimony, advance preparation of a witness is just as important before a meeting with a special investigator.

5. Should a Witness Agree to Provide a Written Statement or to be Tape Recorded?

I always counsel against witnesses agreeing to be tape-recorded. I have, over my 27 years of practice, heard too many witnesses unintentionally misspeak, whether they misunderstood a question, misheard a question, or simply misspoke. Where a tape recording is made, unless counsel knows at the time that a misstatement has been made, no correction can be made, as a practical matter, and later efforts to make a correction may be of only marginal utility. If someone misspeaks in the nervousness of the interview, he should not have a tape recording held against him.

While the conclusion will vary depending upon the circumstances, my own view is that if a witness is submitting to an interview, it will generally also be best to agree to give a written statement. Again, it is critical to evaluate the particular circumstances before agreeing to give a written statement. If an interview is conducted, however, utilization of a written statement ensures the opportunity to correct any errors that may have been made in the investigator's preparation of the statement and also insures obtaining a copy of what has been provided to the special investigator. Absent that, the special investigator may be unwilling to provide a copy of interview notes or any interview memorandum generated during the course of the interview.

6. Lawyer Conduct in the Interview

MSHA special investigators expect to conduct the interview themselves. Should a circumstance arise in which the witness wishes to confer with counsel or should the interview be taking an inappropriate direction, counsel can and should intervene, confer with the witness, and determine what steps to take. Absent that, the primary role of counsel is to protect the witness from overreaching, provide clarifying information as appropriate, and review the statement with the witness before it is finalized to assist with clarifications and corrections.

7. Post-Investigation Statement of Position

Whenever counsel has participated in a special investigation, it is important to do a post-investigation statement of position to the special investigator. This will provide both factual and legal argument, together with other available information mitigating the issuance of any individual penalties. The letter should request that it be included in the file. It will provide a statement of position for evaluation by more senior managers of MSHA as MSHA evaluates the file to determine what actions, if any, to take.

CONCLUSION

Special investigations create especially sensitive problems for mining companies and their managers and counsel. While this article provides thoughts about the process and steps to evaluate, each special investigation must be evaluated on its own merits. Careful attention to the facts of the situation, the presentation of those facts, and the individuals involved (both from the company and MSHA) is necessary and will invariably lead to tailoring the particular approach. "Rules" suggested herein may often find exception in the unique circumstances of a particular investigation. Nevertheless, these broad guidelines should provide counsel with a start to the process.

THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977: IS IT SUFFERING FROM A MID-LIFE CRISIS?

KAREN L. JOHNSTON*

INTRODUCTION

Compliance and enforcement with federal law and regulations regarding safety and health in the workplace in the United States have historically followed the proverbial "stick" approach. Whether this traditional approach has been successful or whether better philosophies exist to achieve workplace safety and health, particularly in the U.S. mining industry, is the focus of this paper. Change is inevitable in light of ongoing federal budgetary concerns and against the background of improvements in technology, attitudes, and reduction in fatalities within the mining industry. Labor, industry, and government leaders should initiate the change by embracing proven concepts based on incentives and self-regulation.

The Federal Mine Safety and Health Act of 1977 (the "Mine Act"),[1] as enforced by the Mine Safety and Health Administration ("MSHA"), an agency within the Department of Labor, regulates every aspect of safety and health in the U.S. mining industry. The Mine Act's sole statutory goal is the protection of the U.S. mining industry's most precious resource—the miner.[2] The Mine Act evolved from the predecessor 1969 Coal Act,[3] which was amended in 1977 to include within its jurisdiction all mines in the U.S., and recently celebrated its thirtieth year in existence. The Mine Act had its genesis in catastrophic disasters, which killed hundreds of U.S. miners between the turn of the century and the mid-1970s.[4]

The Occupational Safety and Health Act of 1970 (the "OSH Act")[5] was enacted by Congress to ensure the protection of employees in general industry from the increasing dangers created by industrialization.[6]

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1. 30 U.S.C. §§801 *et seq.* (1994).
2. 30 U.S.C. §801(a) (1994).
3. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-153.
4. *See, e.g.*, Senate Comm. on Human Resources, Federal Mine Safety and Health Amendments Act of 1977, S. Rep. No. 95-181, at 1-4 (1977).
5. 29 U.S.C. §§651 *et seq.* (1994).
6. 29 U.S.C. §§651 *et seq.* (1994).

The OSH Act is administered by the Occupational Safety and Health Administration ("OSHA"), also part of the Department of Labor. OSHA develops and issues standards, conducts investigations and inspections, issues citations, and proposes penalties for non-compliance by employers.[7] The OSH Act regulates industries affecting interstate commerce, other than mining, but does not apply to the government.[8] Comparison of these two Acts and these two agencies is helpful in understanding the breadth and depth of the Mine Act's jurisdiction and MSHA's authority.

The charge as we move forward into the new millennium is to determine whether the philosophical underpinnings of safety and health legislation, particularly those affecting mining, enacted thirty years ago still reflect current enforcement needs, and to evaluate alternative means of promoting safety and health in the workplace with more goal-oriented programs which recognize incentives for voluntary compliance.

I. OVERVIEW OF THE MINE SAFETY AND HEALTH ADMINISTRATION AND THE MINE ACT

A. *Agency Organization*

Since its inception, the Mine Act has developed into a formidable enforcement mechanism. MSHA, an enforcement arm of the U.S. Department of Labor, is headed by Assistant Secretary of Labor Dave D. Lauriski, who serves under the Secretary of Labor Elaine L. Chao.

MSHA is divided into two enforcement branches, one for Coal and one for Metal/Nonmetal (including stone, sand and gravel) mining, each headed by an Administrator. Three divisions—safety, health, and technical compliance—report to the Administrators. There are national offices of assessments, standards, regulations and variances, educational policy and development, and technical support. The MSHA enforcement units are comprised of eleven Coal District offices, six Metal/Nonmetal District offices, and numerous field offices, which are headed by District Managers and field office supervisors, respectively.

The Mine Act operates through a "split enforcement model" under which MSHA promulgates and enforces rules and regulations governing mine safety and health. Enforcement disputes arising under the Mine Act are heard by a separate governmental agency created by the Mine Act, but funded separately from the enforcement agency. This quasi-judicial agency is the Federal Mine Safety and Health Review Commission ("Review Commission"), composed of five members.[9] The Review Commission's administrative law judges are assigned to hear contested cases initially. The Review Commission may then review the judges'

7. 29 U.S.C. §655 (1994).
8. 29 U.S.C. §652(5) (1994).
9. 30 U.S.C. §823 (1994).

decisions if two or more of its members vote to grant discretionary review. The Review Commission's importance extends beyond its resolution of individual cases, due to its broad authority to formulate national policy and to act as a check on the enforcement zeal of the authorized agents of the Secretary by reviewing the lawfulness of the Secretary's enforcement actions.[10] MSHA is represented in contested cases by the Solicitor of Labor in the national office or in one of the Regional Solicitor's offices.

B. *Mine Safety and Health Act Summary*

The Mine Act is a strict liability statute, meaning that enforcement actions are authorized, regardless of fault, for any violations of the Mine Act or its implementing regulations, including those committed by a mine operator's employees. This is true even when the violation occurs as a direct result of an employee's failure to follow a supervisor's order, or as the result of any other purposeful or idiosyncratic employee behavior.[11] Because of its strict liability nature, defenses such as diminution of safety, lack of exposure or access to a hazard, and dual operator liability are ineffective. An operator's challenge to an alleged violation will not postpone the time set by an inspector to terminate or correct the allegedly violative condition or practice.

The Mine Act prescribes minimum health and safety standards with great specificity and directs the Secretary of Labor to make those standards more stringent as technology and identified hazards warrant and to improve safety and health.[12] Under §506 of the Mine Act, federal preemption of state mine safety and health laws is not recognized except where federal law is more stringent than state law.[13] Thus, every state may have its own dual enforcement program which may be redundant or contradictory to federal law.

MSHA has broad authority to conduct warrantless inspections at mines. The agency carries out essentially three types of inspections: routine,[14] spot,[15] and those conducted pursuant to a miner's complaint.[16] MSHA is *required* to conduct at least *two* routine inspections annually for surface mines and *four* inspections for underground mines.[17] These

10. *See,* Secretary of Labor v. Thunder Basin Coal Co., 510 U.S. 200 (1994).

11. 30 U.S.C. §820(a) (1994); *See,* Asarco, Inc. - Northwestern Mining Dep't v. Federal Mine Safety and Health Review Comm'n, 868 F.2d 1195, 1198 (10th Cir. 1989).

12. 30 U.S.C. §811 (1994).

13. 30 U.S.C. §955 (1994).

14. 30 U.S.C. §813(a) (1994).

15. 30 U.S.C. §813(i) (1994).

16. 30 U.S.C. §813(g) (1994).

17. 30 U.S.C. §813(a).

"twos and fours" are conducted regardless of the mine's compliance efforts as reflected by its violation history and accident and incidence rates compiled annually by the agency. The Mine Act also directs the Secretary to investigate the causes of "accident[s]" and "other occurrence[s] relating to health and safety."[18]

The Mine Act and its regulations require an operator to report, investigate, and maintain records pertaining to all accidents, injuries and illnesses.[19] Annual statistics regarding accident and incidence rates are compiled by the agency using this data.

The Mine Act's enforcement scheme is cumulative in nature, with penalties and the potential for withdrawal orders (cessation of work in an affected area) increasing with higher gravity and negligence findings. These "special findings" are made in connection with every enforcement action taken. A violation is "significant and substantial" if the hazard presented by the violation has serious or grave potential consequences based upon the particular facts surrounding that violation. There must exist a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.[20] A violation is considered to be the result of "unwarrantable failure" (a high degree of operator fault) when the violation occurs as a result of the operator's "aggravated conduct, constituting more than ordinary negligence."[21] These important definitions are not found in the Mine Act. Rather, the definitions have evolved through litigation in contested cases.

An additional component of the Mine Act's cumulative enforcement scheme is known as "excessive history." Each time a violation is assessed by the MSHA Office of Assessments, MSHA calculates the overall history of violations for the mine for a preceding 24 month period. A mine is placed on excessive history when the number of violations per inspection day, as calculated by MSHA, is 2.1 or more.[22] A designation of excessive history of violations affects the amount of penalty assessed for routine, non-significant and substantial violations and can result in a significant financial impact on a mine operator. An operator who is not on excessive history can expect a single penalty assessment amount of $55 for this type of routine minor violation; an operator on excessive history can be assessed a penalty ranging from $66 to $55,000 per routine minor violation.[23] This aspect of the Mine Act's enforcement scheme can result in a mine operator paying increasingly onerous penalties for relatively minor violations, despite the fact that the operator may have an

18. 30 U.S.C. §813(b) (1994).

19. 30 U.S.C. §813(d) (1994); 30 C.F.R. Part 50 (2001).

20. Secretary of Labor v. Cement Div., Nat'l Gypsum Company, 3 FMSHRC 822, 825 (Rev. Comm. 1981).

21. Emery Mining Corp. v. Secretary of Labor, 9 FMSHRC 1997, 2004 (Rev. Comm.1987).

22. 30 C.F.R. §100.4(b) (2001).

23. 30 C.F.R. §100.4(a)(2) (2001).

excellent incident and injury rate (demonstrating the effectiveness of the operator's safety program). An excessive history is not necessarily indicative of an unsafe mine operation, but MSHA relies on history to justify increased penalties, without taking into consideration other mitigating factors.

1. Summary of MSHA's major enforcement tools

Provision of the Mine Act	Enforcement Action Taken
§814(a)	If the Secretary believes a violation exists, a citation must be issued, setting a reasonable abatement time.[24]
§814(b)	A withdrawal, or closure, order may be issued for the area affected by the violation for a failure to abate, or correct, the violation within the time prescribed.[25]
§814(d)	A citation for a significant and substantial ("S&S") violation, caused by the operator's unwarrantable failure to comply with a standard, commences a "withdrawal order chain" each time thereafter a violation resulting from an unwarrantable failure to comply is observed.[26] An intervening "clean" inspection (*i.e.*, no unwarrantable failures) breaks the withdrawal order chain.
§814(e)	If an operator is identified as a "pattern violator," all violations characterized as "S&S" result in withdrawal orders until an intervening inspection reveals no "S&S" violations.[27]
§814(f)	A withdrawal order will be issued for failure to comply with respirable coal dust concentration limits.[28]
§814(g)	A withdrawal order will be issued for failure to provide mandatory training required under the Mine Act.[29]

24. 30 U.S.C. §814(a) (1994).
25. 30 U.S.C. §814(b) (1994).
26. 30 U.S.C. §814(d) (1994).
27. 30 U.S.C. §814(e) (1994); 30 C.F.R. Part 104 (2001).
28. 30 U.S.C. §814(f) (1994).

§817(a)	A withdrawal order will be issued for a condition or practice that can be expected to cause death or serious physical harm before it can be corrected, regardless whether the condition or practice violates a standard or rule.[30]

2. Summary of the Mine Act's civil and criminal penalties

Provision of the Mine Act	Potential Penalty
§820(a)	An operator of a mine in which any violation occurs is assessed a civil penalty of no more than $55,000 per violation. The civil penalty formulas consider criteria such as gravity, negligence, size of operator's business and good faith in achieving compliance.[31]
§820(c)	An operator or corporate officer, director or agent (one who supervises all or part of a mine or miners[32]) who "knowingly" authorizes, orders or carries out a violation or refuses to comply with an order may be fined civilly up to $55,000 and/or charged criminally ($25,000 fine and up to one year imprisonment for first offense).[33]
§820(d)	An operator or corporate officer, director or agent who "willfully" authorizes, orders or carries out a violation or refuses to comply with an order may be fined up to $25,000 and or up to one year imprisonment (first offense), or up to $50,000 fine and up to 5 year imprisonment (second offense).[34]
§820(e)	Any person who gives advance notice of inspections is subject to criminal fine up to $1000 and/or six months imprisonment.[35]

29. 30 U.S.C. §814(g) (1994).

30. 30 U.S.C. §817(a) (1994).

31. 30 U.S.C. §820(a-b),(i) (1994); 30 C.F.R. §100.3(b-g) (2001).

32. 30 U.S.C. §802(e) (1994).

33. 30 U.S.C. §820(c) (1994). In the event that the violation results in a death, the criminal fine may be increased to $250,000. 18 U.S.C. §3571(b)(4) (1994). If no death results, it may be increased to $100,000. 18 U.S.C. §3571(b)(5) (1994).

34. 30 U.S.C. §820(d) (1994). In cases where the "operator" is determined to be an "organization," the criminal fine may be increased to $500,000 for misdemeanors that result in a death. 18 U.S.C. §3571(c)(4) (1994). If no death results, it may be increased to $200,000. 18 U.S.C. §3571(c)(5) (1994).

35. 30 U.S.C. §820(e) (1994).

§820(f)	Any person who knowingly makes false statements, representations or certifications in any application, report, plan, record or other document required to be maintained or filed under the Act is punishable by fine of up to $10,000 and/or imprisonment of up to 5 years.[36]

II. COMPARISON OF MSHA WITH ITS SISTER AGENCY, THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, AND THE OSH ACT

A. *Major Provisions and Aspects of the OSH Act and Agency Organization*

It is instructive to compare MSHA, and its administration of the Mine Act, with its sister agency, OSHA, and its administration of the OSH Act.

There are some similarities between MSHA and OSHA. For example, the OSH Act operates under a split enforcement model similar to the Mine Act, with a three-member independent quasi-judicial Commission.[37] An employer cited for an OSHA violation may request a review of a violation or penalty assessment by an administrative law judge assigned by the Occupational Safety and Health Review Commission.

The OSHA enforcement units are comprised of ten regions and eighty-five area offices throughout the United States, which are headed by Area Directors and field office supervisors in charge of compliance officers. Compliance officers are authorized to take enforcement actions based on evaluations of gravity and negligence similar to those taken under the Mine Act. OSHA compliance officers have authority to conduct investigations and inspections, issue citations, and propose penalties for non-compliance by employers.[38] An inspector may characterize citations as "other-than-serious," "serious," "willful," and "repeat," based on the specific facts surrounding the violation. The minimum penalty for a repeat or willful violation is $5,000, and the maximum is $70,000. The maximum penalty for each other-than-serious or serious violations is $7,000. A failure to abate violation can result in assessment of a penalty

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36. 30 U.S.C. §820(f) (1994). In this case, the criminal fine may be increased to $250,000 pursuant to 18 U.S.C. §3571(b)(3) because violations of §110(f) are classified as felonies. 18 U.S.C. §3559(a)(5) (1994).

37. 29 U.S.C. §651 (1994).

38. 29 U.S.C. §655 (1994).

of up to $7,000 a day.[39] OSHA's "egregious" penalty policy initiated in 1991 has resulted in record-high fines by counting each separate employee exposure to a hazard as a separate violation meriting a fine.

OSHA prioritizes its compliance goals in order to conserve its resources and conducts three basic types of inspections: programmed, unprogrammed, and monitoring. OSHA prioritizes the various types of inspections as follows:[40]

- First priority: imminent danger
- Second priority: fatality/catastrophe investigations
- Third priority: complaints/referrals investigation
- Fourth priority: programmed inspections

With the present number of inspectors employed by OSHA and the number of sites covered, OSHA visits many worksites only once during a ten-year period.[41] This is contrasted by MSHA's statutory mandate to inspect surface mines two times per year and underground mines four times per year.[42]

B. *Comparisons Between the Mine Act and the OSH Act*

Key differences between the Mine Act and the OSH Act include:

- The OSH Act is *not* a strict liability statute. Therefore, defenses such as employee misconduct or lack of exposure to hazard may be successful.
- The OSH Act contains no minimum mandatory inspection requirements.
- OSHA has no general mandatory minimum training requirements but does have specific requirements in some standards.
- OSHA has no warrantless inspection power; warrants must be obtained if the business will not waive the warrant requirement.
- The OSH Act provides no withdrawal order authority without first obtaining an order from a federal court, and then only in the case of an imminent danger.

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39. 29 U.S.C. §666 (1994); New OSHA Civil Penalties Policy, OSHA Fact Sheet No. OSHA 92-36 (1/1/92).

40. Field Inspection Reference Manual, I.B.3, OSHA Instruction CPL 2.103 (Sept. 26, 1994).

41. HERITAGE FOUNDATION, A BUDGET FOR AMERICA, 245 (Angela M. Antonelli et al. eds., 2001).

42. 30 U.S.C. §813(a) (1994).

- OSHA recognizes state primacy of approved enforcement programs, eliminating dual enforcement roles of state and federal agencies.
- Contest of a violation issued by OSHA effectively stays the requirement for abatement until after a full adjudication of the merits of the enforcement action.
- The OSH Act applies criminal liability to an employer in cases where a death occurs as a result of a willful violation. It has no civil penalty authority against individuals, *i.e.*, agents, officers or directors.

C. *MSHA/OSHA Budget Comparisons*[43]

FY2000	MSHA	OSHA
FY 2000 Budgets	$228 million	$382 million
Private Sector-Employees Covered Total	357,000	111,000,000
PrivateSectorEmployees Covered per Inspector	388	89,516
Dollars Spent per Employee Covered	$638.00	$56.00
Sites Covered	13,902	4.0+ million
Dollars Spent per Site Covered	$16,400.00	$74.00
Number of Federal Inspectors	920	1,240

In terms of pure dollar amounts, MSHA's overall budget authority for FY 2001 increased to $242.2 million, an increase of $14.2 million over FY 2000. OSHA's overall budget authority for FY 2001 also increased, by $44 million, to a total budget authority amount of $426 million.[44]

D. *Overview of OSHA Policy Initiatives*

In the mid-90s, OSHA announced that an effective and credible enforcement program provides the cornerstone for safe workplaces. As evidence of that resolution, the agency began assessing increasingly higher penalties against violators.[45] At the same time, OSHA's leaders pledged to improve targeted inspections and focused inspections and to involve workers and employers in the process of workplace safety by providing mechanisms for involvement and incentives. In furtherance of these efforts, OSHA underwent an evaluation which produced a report entitled *The New OSHA—Reinventing Worker Safety and Health.*[46] The

43. HERITAGE FOUNDATION, *supra* note 42, at 245.

44. Budget authority data available from MSHA at <http://www.dol.gov/dol/_sec/public/budget/msha20001.htm> and from OSHA at <http://www.dol.gov/dol/_sec/public/budget/osha20001.htm>.

45. 74 Daily Lab. Rep. (BNA) A-8 (Apr. 19, 1994); 106 Daily Lab. Rep. (BNA) A-1 (Jun. 6, 1994).

46. NATIONAL PERFORMANCE REVIEW, THE NEW OSHA - REINVENTING WORKER SAFETY AND HEALTH (May 1995).

report focuses on alternative philosophies to traditional coercive compliance through industry "partnerships" with the agency. (MSHA has yet to undertake such an introspective evaluation.)

The New OSHA—Reinventing Worker Safety and Health incorporates a number of suggested proposals for revamping OSHA, recognizing that, historically, OSHA has been driven by statistics and rules and a "one size fits all" approach in terms of enforcement and inspection efforts. The report lauds efforts by OSHA and industry to shift responsibility for ensuring the safety and health of workers to employers, managers and workers, and to provide special incentives to employers who initiate effective worksite safety and health programs which identify hazards and ensure safety awareness. Incentives provided by OSHA to employers who adopt the partnership approach include:

- assignment of lower priority for enforcement inspections (*i.e.*, reduced inspections);
- assignment of higher priority for technical assistance;
- penalty reductions that could be as great as 100%.

OSHA has discovered through these few initiatives, initially undertaken experimentally, that shifting more responsibility to employers allows them to decide how they want to be regulated. If employers choose to implement safety and health programs that (in a sense) self-regulate their workplaces, the ultimate result has been greater protection for their workers, and less "red tape," paperwork, and enforcement action by OSHA. As a result of the demonstrated benefits of these initiatives to industry, workers, and the government, the OSHA Strategic Partnership Program for Worker Safety and Health (OSP) was adopted by the agency on November 13, 1998.[47]

While not predominant throughout general industry, the partnership initiative has slowly increased in popularity in the latter half of the 1990s, with OSHA entering into partnership agreements on a national and regional basis. Recently, OSHA and the Associated General Contractors of America entered into a formal partnership agreement which will allow contractors with the best safety records to avoid targeted inspection lists. The agreement sets forth specific, objective criteria which the contractor must satisfy in order to attain "blue" status (*e.g.*, injury/illness rate which is 10% below the construction industry average; institute a comprehensive site specific written safety and health program; provide necessary orientation and training; no willful or repeat serious violations in the last three years; no fatalities or catastrophic accidents in

47. OSHA Directive No. TED 8-0.2 (Nov. 13, 1998).

the past three years which resulted in serious citations). Once the criteria are met, among other benefits, OSHA agrees to conduct unplanned inspections only under specific circumstances and not to target the site for a planned inspection within the next twelve months.[48]

OSHA's innovative use of partnership agreements has enabled those participating employers in general industry to implement effective safety and health programs within the workplace, increasing worker protection, with diminished concern of governmental enforcement activity. Conversely, the programs have enabled OSHA to better focus its enforcement activities and resources on those employers whose safety records demonstrate an increased need for government oversight.

III. WHAT'S WRONG WITH U.S. SAFETY AND HEALTH REGULATION, PARTICULARLY THE MINE ACT

The two principal safety and health Acts in the U.S. stem from a troubled history of labor-management conflict, serious industrial safety and health problems, and relative industry and government neglect. It is not surprising, therefore, that these remedial statutes (and their predecessors) were cast in a punitive mold during the period 1966 - 1977. Whether that mold retains its utility for the 21st Century has been the subject of recent and on-going debate. We suggest that a new regulatory direction is needed.

A. *The Regulatory System Lacks Flexibility*

By and large, the voluminous standards issued by the enforcement agencies are too *rigid* and *prescriptive*. Regulated enterprises are afforded little flexibility to devise methods of compliance that may work best for them under the circumstances of their operations. Worse still, the Mine Act itself is an extremely rigid statute whose structure precludes many of the creative enforcement directions currently being initiated under the somewhat looser regime of the OSH Act.

The tremendous quantity and detail of these bodies of regulation are fairly mind-boggling. Indeed, one of OSHA's "reinvention" priorities is eliminating some 1,000 pages of redundant and unnecessary regulations.[49] All of this reflects *paternalistic* government at its most intrusive. In the 1970s, it was assumed by some (and, of course, still is) that government *does* know best and that inflexible prescription is the *only* means of achieving betterment. It is true that progress has been attained in reducing accidents, injuries, disease, and fatalities. The former

48. OSHA and Associated General Contractors Form Partnership to Improve Safety in Construction, OSHA Trade News Release (Dep't of Labor Jan. 9, 2001).

49. Fleming, S.H., *Charting a New Course Toward Workplace Safety and Health*, Vol. 7 Job Safety and Health Quarterly 9, 10 (1996).

Assistant Secretary of Labor for Mine Safety and Health, J. Davitt McAteer, testified before the U.S. House of Representatives Committee on Education and the Workforce, Subcommittee on Workforce Protections, to the recent accomplishments of the mining industry over the past decades, noting that the past five years have been the safest on record for the U.S. mining industry and that the U.S. mining industry is at the forefront of mine safety among major producing countries in the world.[50] The relative fatality rates per million tons of coal produced in several coal producing countries fills in some of the details. For example, in 1996, China's fatality rate was 7.29, Russia's was 0.66, India's rate was 0.47, followed by South Africa and Poland at 0.23. The U.S.'s rate was far lower than any of these countries at 0.04.[51] The OSH Act and Mine Act have played an important role in that progress. However, the progress has also been due to such factors as the social maturation of industry, a growing appreciation by labor and management of the importance of safety and health in stable employment and production, and increased automation of industrial processes with concomitant reduction of associated risks.

Moreover, the public resources available for the implementation of the current enforcement models are not likely to expand. On the contrary, they will probably contract. Accordingly, in an environment wherein progress continues to be achieved, it is time to question seriously the paternalistic underpinnings of the present law.

B. *The Regulatory System is not Sufficiently Performance-Based*

Related to the above problems is the fact that too few safety and health standards are performance-based. If the fundamental goal is, as it should be, the result of improved safety and industrial hygiene, the obsessive concern with how the results are achieved makes little economic sense. Good performance speaks for itself, and good government should recognize results.

In testimony that was as timely several years ago as it is today, Michael E. Baroody of the National Association of Manufacturers summa-

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50. *A Review of Mine Safety & Health: The State of the Industry Today: Hearing Before the House Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce*, 107th Cong. (Sept. 14, 2000) (statement of J. Davitt McAteer, Asst. Secretary for Mine Safety and Health, U.S. Dept. of Labor).

51. *A Review of Mine Safety & Health: The State of the Industry Today: Hearing Before the House Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce*, 107th Cong. (Sept. 14, 2000) (statement of Bruce Watzman, Vice President, Safety and Health, National Mining Association); Eckholm, Erik, *Dangerous Coal Mines Take Human Toll in China*, N.Y. Times, June 19, 2000.

rized this problem well in 1995, while testifying on regulatory reform legislation:

> The shortcomings of our present regulatory system are not limited to the absence of a rational method for setting regulatory priorities. Major problems also are evident in the way in which health, safety, and environmental regulations are developed, structured, and implemented.... [Among other things,] . . . [a]gency rules tend to be relatively inflexible, reflecting a penchant for command-and-control specification, rather than a performance-based orientation. This results in regulations that are far less cost-effective than they could be, and it frequently precludes the adoption of . . . management practices that would actually be more protective and less costly than the actions required under the rule.[52]

C. *The Mine Act is Premised on an Outmoded Concept of Strict Liability*

As previously noted, this concern applies only to the Mine Act. Strict liability is a punitive concept that is wrong for two reasons: (1) strict liability deters exemplary performance—no matter how hard it strives, the operator will be held responsible for *all* violations, even those in which it was not at fault; and (2) strict liability exempts *miners* from meaningful responsibility for safety and health in mines. Safe mines must be a priority, not only to operators, but to miners alike. Placing the responsibility for an unsafe act where it actually belongs in each case, including with miners, is a more powerful means of ensuring responsible attitudes by all.

D. *The Regulatory System Excessively Relies Upon Governmental Enforcement for Compliance*

This problem, present under both Acts, is especially acute with respect to the Mine Act, with its scheme of mandatory inspections ("twos and fours"). Under the Mine Act, compliance is not encouraged through meaningful self-audit or self-regulation. Rather, compliance is forced through an adversarial system of governmental inspection often followed by an even more adversarial system of litigation. Recently, however, OSHA has made a positive move in the direction of compliance through meaningful self-audit via implementation of its *Final Policy Concerning the Occupational Safety and Health Administration's Treatment of Voluntary Employer Safety and Health Self-Audits* ("Final Policy on Self-Audits").[53]

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52. *Regulatory Reform Legislation: Why Is It Needed? What Should It Provide?: Hearing Before the Senate Committee on Environment and Public Works*), 102nd Cong. (March 21, 1995) (statement of Michael E. Baroody, Nat'l Assn. of Manufacturers).

53. Final Policy Concerning the Occupational Safety and Health Administration's Treatment of Voluntary Employer Safety and Health Self-Audits, 65 Fed. Reg. 46,498 (July 28, 2000).

OSHA believes that "[v]oluntary self-audits, properly conducted, may discover conditions that violate the [OSH] Act so that those conditions can be corrected promptly and similar violations prevented from occurring in the future."[54] OSHA acknowledges the benefits to worker health and safety that may be derived from voluntary self-audits. Consequently, OSHA adopts the position in the Final Policy on Self-Audits that compliance officers will not routinely request voluntary self-audits at the initiation of an inspection, nor will OSHA utilize a self-audit, obtained through legal means or by employer submission, to either focus or expand an inspection. The Final Policy on Self-Audits provides that violative conditions identified in qualifying self-audits will not be used as the basis for issuing citations to the employer where the violative condition was corrected prior to the inspection and the employer has taken steps to avoid the recurrence of the condition.

In addition, the Final Policy on Self-Audits provides for a "safe harbor" for employers, wherein a qualifying self-audit may be used as evidence of good faith in those situations where the corrective steps have been undertaken but not completed at the time of the inspection, instead of used as evidence to support a willful violation (on the basis that the employer had knowledge of the violative condition, as demonstrated by the self-audit, and allowed it to exist). Moreover, where a qualifying self-audit is deemed evidence of good faith, the employer may expect to receive a corresponding reduction in penalty assessments. It is this type of innovative means of enforcement that will increase worker safety and health by encouraging employers to periodically re-evaluate the work environment without fear of repercussion or unduly stringent enforcement action being taken against them.

E. *The Regulatory System is Unduly Punitive*

Both statutes enforce their mandates almost entirely through punishment rather than incentive. Violations receive citations and violators are subjected to penalties. On a national basis, the penalty amounts proposed by these agencies are large. For example, according to MSHA statistics, in FY 1999 MSHA proposed $24.4 million in penalties. Based on OSHA data for FY 1998, the most current data available from the agency, federal OSHA and the state OSHA programs proposed almost $108 million in penalties. Too little attention has been given under either statute to methods of encouraging, assisting, and rewarding successful performance.

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54. *See id.* at 46,502.

F. *Lack of Proper Assessment in Developing Regulations*

Like most other federal agencies, MSHA and OSHA do not sufficiently conduct reliable risk assessment and cost-benefit analysis in promulgating rules or allocating regulatory priorities. A classic example of this problem was afforded by OSHA's unhappy experience in the past year when it attempted to regulate, in one fell swoop, musculoskeletal disorders, or repetitive motion injuries. OSHA published the Ergonomics Rule in the Federal Register on November 14, 2000,[55] and it was immediately widely denounced by industry. The regulation was repealed by President Bush on March 21, 2001, when the President signed into law S.J. Res. 6, marking the first time the Congressional Review Act[56] has been put to use.[57] The Ergonomics Rule was repealed because OSHA had failed to establish a sound basis for its sweeping regulatory action and failed to demonstrate that the uncertain benefits of the rule came anywhere close to justifying the tremendous costs to employers, including financial costs of implementation and compliance.

The science underlying OSHA and MSHA regulations is not always submitted to the crucible of *independent* peer review. Thus, agency actions are not always based on the best (or even good) science. In many cases, these agencies inadequately state the actual health and environmental risks involved in their proposed regulations. They sometimes target risks looming larger in their minds than in reality. Public participation in the regulatory process is often not very meaningful.

IV. QUANTITATIVE REVIEW

Available data on fatalities and injuries, MSHA budget expenditures, and the declining number of mines and miners, all underscore the need for MSHA reform. In a 2001 report, The Heritage Foundation, a conservative think-tank, articulated the case for a dramatic restructuring of the Federal mine safety and health program by such means as elimination of MSHA and absorption of its functions by an enlarged OSHA:

> Both the number of American workers involved in mining and the injuries associated with it have declined significantly in recent years, calling into question whether there is any rationale for a separate

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55. OSHA Final Rule on Ergonomics, 65 Fed. Reg. 68,261 (Nov. 14, 2000).

56. Congressional Review Act, 5 U.S.C. §§ 801, *et seq.* (2001). The CRA is Subtitle E of Title II (The Small Business Regulatory Enforcement Fairness Act) of the Contract With America Advancement Act of 1996, Public Law 104-121. Under the CRA, Congress has placed upon itself the responsibility to ensure that regulations promulgated by federal agencies are necessary and accomplish what they are intended to in the most cost-effective and least burdensome manner. Until Congressional review of the Ergonomics Rule, the CRA had not been used to overturn a single regulation in the five years since the law went into effect.

57. Statement by the President, The White House, Office of the Press Secretary (March 20, 2001).

> agency dedicated to the safety and health of miners. . . . MSHA is funded at $228 million in FY 2000 and has over 2,300 employees, about 920 of whom are inspectors. According to government sources, these numbers translate into a ratio of about one inspector for every four coal mines and every 41 metal/nonmetal mines. In contrast, OSHA received $382 million in FY 2000 and has around 1,240 inspectors enforcing health and safety standards in over 4.0 million non-mining worksites. Whereas MSHA is required by law to inspect underground mines four times a year and surface mines two times a year, OSHA visits many worksites only once during a ten-year period. Therefore, MSHA spends about $16,400 per year for every mine under its jurisdiction and over $638 per year for every miner employed in the industry, while OSHA spends around $74 per covered worksite and less than $56 per employee.[58]

The Heritage Foundation asserts that MSHA should be restructured into an office within OSHA, modeled after OSHA's Construction Safety Office. The Heritage Foundation further advocates phasing out the Federal Mine Safety and Health Review Commission and having Mine Act cases adjudicated by the Occupational Safety and Health Review Commission.[59]

A. *Fatality Data*

Since the 1970s, fatalities, injuries and illnesses in the U.S. have dramatically declined. Based on the Department of Labor's Bureau of Labor Statistics ("B.L.S.") *Census of Fatal Occupational Injuries* ("C.F.O.I."), from 1970 to 1999, American workplace fatalities have been reduced from an estimated 13,800 to 6,023. Mining fatalities during the same period have been lowered from approximately 600 to 121. From 1970 to 1999, the overall American workplace fatality rate dropped from 18 per 100,000 workers to approximately 5.5 per 100,000 workers.

Occupational fatalities by industry in 1999, based on the B.L.S.'s 1999 C.F.O.I., placed mining at approximately 2% of fatalities, behind construction (20%), transportation (17%), service (12%), agriculture (13%), manufacturing (12%), retail trade (8%), government (9%), and wholesale trade (4%). Thus, in terms of the actual numbers of fatalities experienced, these other industrial sectors are all more dangerous than mining. Average mining employment in 1999 (about 535,400 employees, including oil and gas extraction workers) accounted for only .5% of all industry employment. Because of the relatively low number of miners employed, the 1999 mining fatality rate of about 22 per 100,000 employ-

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58. HERITAGE FOUNDATION, *supra* note 42, at 245 (2001).
59. *See id.*

ees was high. Nevertheless, the numbers of mining fatalities are still low compared to the rest of industry.

The improving conditions in the U.S. mining industry were testified to by Joseph A. Main of the United Mine Workers of America. Main's testimony paints a picture of dramatically improved working conditions by noting that in the 30-year period prior to the enactment of the Federal Coal Mine Health and Safety Act of 1969, 19,144 miners were killed in the nation's coal mines. In the 30-year period following enactment of the 1969 Coal Act, there were 86% fewer coal mining deaths. In the metal/nonmetal mining industry, 3,889 deaths were recorded in the 23-year period prior to the Federal Metal and Non-Metallic Mine Safety Act of 1966; in the same period following passage of the Metal and Non-Metallic Mine Act, there were 40% fewer deaths.[60]

B. *Injury/Illness Data*

Since the early 1970s, the U.S. non-fatal occupational injury and illness rates have also declined. According to the B.L.S.'s *Survey of Occupational Injuries and Illnesses* for the years 1995-1999, the total injury/illness rate for private industry per 100 full-time workers declined during the period 1995 to 1999 from 8.1 to 6.3. The mining incidence rate during that same period fell from 6.2 to 4.4.

Mining also compared well to other important industrial sectors in the period 1995-1999. In sum, these data show that fatalities, injuries, and illnesses in mining have greatly decreased. Since the early 1970s, the fatality rate in mining has fallen nearly 75% and the injury/illness rate has dropped by one-third in the past five years.

C. *Employment Data*

The numbers of mining operations and miners employed have drastically declined since 1970, yet MSHA's budget and personnel have continued to remain at both steady and high levels. In a February 1996, speech at a Washington mining safety and health workshop, Representative Cass Ballenger (R-NC), who has introduced important OSHA and MSHA reform bills, emphasized the economics of regulation. He noted that in 1977, when MSHA was started, there were 20,000 mines subject to the Mine Act, employing nearly 500,000 miners. In 1995, those numbers had dropped to 14,000 mines and 370,000 miners (including a 40% reduction in underground mines). Most recent figures available (for 1998) show that these numbers have continued to decrease: 13,876 aver-

60. *A Review of Mine Safety & Health: The State of the Industry Today: Hearing Before the House Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce*, 107th Cong. (Sept. 14, 2000) (statement of Joseph A. Main, Administrator, Dept. of Occupational Health and Safety, United Mine Workers of America).

age total active mining operations and 357,315 average number of miners working at active mining establishments.[61] Yet MSHA's budget and personnel have grown and continue to grow. When these factors are considered together with the striking success in reducing fatalities and injuries in mines, discussed above, seeking continuing improvement through new directions in the character, cost-effectiveness, and methods of regulation is both a rational and timely enterprise.

D. *Lack of Direct Correlation Between Cited Standards and Causes of Accidents*

The top-cited standards under the Mine Act do not necessarily correlate well with the leading causes of injuries and fatalities. In recent years, the most frequently cited MSHA standards address combustible accumulations (coal mining) and guarding (metal/nonmetal mining). Neither of these areas are the leading sources of most fatalities, injuries, and illnesses. In coal, the leading cause of fatalities is fall of roof or back and powered haulage; in metal/nonmetal, the leading cause of fatalities is powered haulage. The leading cause of non-fatal injuries in coal and metal/nonmetal is handling of materials.[62] Moreover, the lack of significant analysis as to whether compliance with the frequently cited standards could have prevented particular accidents or illnesses makes judging actual effectiveness difficult.

V. LEGISLATIVE AND REGULATORY REFORM: PROSPECTIVE AND POLITICS

Regulatory reform continues to be a major focus of attention on Capitol Hill. To date, however, legislative success has largely eluded proponents of reform. President Clinton had threatened to veto any measures that would, in his Administration's view, compromise workers' safety and health protection. However, with the Bush Administration demonstrating a new openness toward regulatory reform, the chances for enactment of a major reform bill seem to be looking brighter. Given the number of serious proposals on various Congressional tables in the past and a fair amount of bipartisan support for *some* form of regulatory improvement, it is likely that reform initiatives will be advanced and some reform measure will be seriously considered.

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61. Statistics obtained from National Mining Association website, *Summary of Selected U.S. and World Mining Statistics*, <http://www.nma.org/SMB%20intlsummary.pdf>.

62. Based on accident classification statistics from MSHA for FY 1999 and FY 2000, MSHA, *Mine Injury and Worktime Quarterly Statistics*, <http://www.msha.gov/ACCINJ/ALLMINES.HTM>.

A. *Testimony in Congressional Oversight Hearings*

Even in the waning months of the Clinton Administration, Congress demonstrated its increased interest in reforming the Mine Act and MSHA by holding oversight hearings. On September 14, 2000, the U.S. House of Representatives Committee on Education and the Workforce, Subcommittee on Workforce Protection, held a hearing at which representatives of industry, labor and the agency testified. Representatives of industry articulated a common goal of moving toward regulatory reform and a less onerous enforcement environment.[63] One of the suggested reforms included discarding the current system of mandated "twos and fours" inspections and, instead, focusing the inspection resources on those mines whose safety records demonstrate a need for on-going enforcement oversight (i.e., a targeted enforcement model more similar to that utilized by OSHA). A novel approach to enforcement was suggested by L. Joseph Ferrara, Esq., former General Counsel of the Review Commission, in the concept of development of a class of minor violations and eligibility criteria that would designate "abatement-only" status to violations, avoiding the need for the oftentimes onerous paper enforcement action and penalty, especially the excessive history criteria, and the accompanying litigation. Other reasonable, workable reforms suggested included the provision for petitions for modifications of health standards and an increased openness to and acceptance of the use of personal protective equipment, in conjunction with engineering and administrative controls.

VI. WHAT IS TO BE DONE—NECESSARY REFORMS OF THE SAFETY AND HEALTH LAWS

From all that we have surveyed, the indicated paths of needed change emerge clearly. The U.S. must turn away from the prescriptive, paternalistic, bureaucratic, and punitive models of regulation that the Mine Act and OSH Act encapsulate. What may have worked in the 1970s will continue to be increasingly counterproductive in the 21st Century.

In the field of occupational safety and health, impressive strides have been made since the 1970s in reducing accidents, injuries, and illnesses in the American workplace, particularly in mining. Indeed, mining is now one of the safer industrial sectors, judged by those criteria. Certainly, the OSHA and MSHA programs have played a role in this im-

63. *A Review of Mine Safety & Health: The State of the Industry Today: Hearing Before the House Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce*, 107th Cong. (Sept. 14, 2000) (statement of Bruce Watzman, Vice President, Safety and Health, National Mining Association); *A Review of Mine Safety & Health: The State of the Industry Today: Hearing Before the House Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce*, 107th Cong. (Sept. 14, 2000) (statement of L. Joseph Ferrara, Esq., Jackson & Kelly PLLC).

provement. But it is appropriate to ask whether it is still necessary in the 2000s to employ the hammer of the 1970s. Can *more* be achieved if new methods of regulation are tried?

We suggest the following direction as mining moves into the Third Millennium:

- **Greater industry self-regulation:** In the 21st Century, government cannot do it all. Government cannot afford to do it all. If these premises are accepted, then it follows that the private sector should be encouraged to do more through greater self-regulation. This can be accomplished by such tools as development of individualized "plant codes"; safety and health audits by certified private parties as an alternative to government inspection; confidential self-auditing by affected operators that can be carried out without threat of "self-incrimination" or penalization.

- **Greater use of scientific risk assessment, prioritizing of risk-reduction goals, and employment of cost-benefit analysis:** OSHA and MSHA must balance better the societal and economic cost of regulation with anticipated benefits.

- **Greater flexibility in regulation:** The prevailing rigidly prescriptive model should be shifted to a *performance-based* system. The government should pursue improvement through focus on actual outputs and results—not detailed, prescribed schemes of achieving those results.

- **Independent peer review:** Risk assessments and the claimed scientific bases for regulations should be subjected to independent *peer review* so that proposed regulation is based on the *best available science.*

- **Incentives rather than punishment:** There must be far greater emphasis placed on providing *incentives* for improved performance and a de-emphasis on the punitive philosophy that animates the present Acts. This can take forms such as government consultation, assistance and training to achieve better results—rather than punishment through penalties. At the governmental inspection level, a history of good performance should lead to lessened government intrusion. (On the flipside, such an approach would mean that government could better focus its attention on the most problematic enterprises and scofflaws.) Violations, if not serious or repeat, should trigger prompt correction, not penalties.

- **Jettisoning strict liability in the Mine Act:** The Mine Act should proceed on a fault-based system, where the highest levels of operator achievement are rewarded. The mine operator should be responsible for putting forth its best efforts to achieve results, but should not be held accountable for every unavoidable, unpredictable incident.

To accomplish much of this reform in the mining arena, the Mine Act must be legislatively overhauled in dramatic fashion. Its present rigidity is blocking creative avenues for further improvement.

CONCLUSION

There is growing pressure in the U.S. to alter the predominant regulatory model. This seems particularly appropriate in the occupational safety and health field. The mining industry is contracting and consolidating. American industry as a whole faces increasingly vigorous world competition. Resources available for the public sector are constrained as never before. The enlightened American business has learned that poor safety and health practices, and the attendant losses, can spoil the bottom line.

The stern parental government must relax its grip on responsible industry participants and reserve its "stick" for woodshedding those who demonstrate unwillingness to achieve expected and realistic results. It is also likely that the regulatory agency of the future will have to make its case more convincingly that its regulations stem from reliable and prioritized risk assessment, have been subjected to the crucible of cost-benefit analysis, and are founded on "good" science.

As we await the next batch of regulatory reform bills to be proposed in Congress, it is good to consider what lies on the horizon. The answer to this paper's topic is, we suggest, that the Mine Act is in need of substantial reform in order to enable regulation of the mining industry to age gracefully while at the same time bringing the U.S. enforcement model into the 21st Century.

ADDENDUM TO PROTECTING THE BOUNDARY WATERS CANOE AREA WILDERNESS: LITIGATION AND LEGISLATION

RICHARD A. DUNCAN

The authors wish to add a short addendum to this reprint of their original 1999 article. It discusses first a lawsuit involving the Boundary Waters Canoe Area Wilderness ("BWCAW") which was not included in the original article as it did not result in any published judicial opinions but which, given the continuing controversy over its subject matter--Air Force training flights over national parks and wilderness--is worthy of further mention. Second, we bring the reader up to date on the political fortunes of the prime movers behind the 1995-1998 truck portages controversy culminating in federal mediation and legislation.

THE SNOOPY MOA LITIGATION

In 1988 a coalition of environmental groups brought suit under the National Environmental Policy Act,[1] ("NEPA"), challenging the United States Air Force's establishment and steadily increasing use of the Snoopy Military Operations Area ("MOA"). This MOA covered northeastern Minnesota including the southern portion of the BWCAW and served primarily an Air National Guard unit based in Duluth, flying F-4 jets.[2]

Various military units used Snoopy MOA prior to 1975. In 1975, when the Federal Aviation Administration ("FAA") officially charted Snoopy MOA, neither the FAA nor the Air Force prepared an Environmental Assessment ("EA") or an Environmental Impact Statement ("EIS"), despite the fact that NEPA had been on the books for several years.[3] The Air Force belatedly prepared a short EA in 1977, finding no significant environmental impact based upon assumptions of limited use of the area by Air Force trainers, flying above 10,000 feet.[4] The 1977 EA gave no consideration to the effects of jet fighter overflights on the BWCAW and its visitors. Indeed, there was no recognition that Snoopy MOA overlay a federally designated wilderness.[5]

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1. 42 U.S.C. § 4321, et seq. (2000).
2. Friends of the Boundary Waters Wilderness v. Temple, No. 3-88-423 (D. Minn. 1989).
3. Complaint for Temple, Friends of the Boundary Waters Wilderness v. Temple, No. 3-88-423 (D. Minn. 1989) (No. 3-88-423).
4. *Id.*
5. *Id.*

The use of Snoopy MOA began to increase dramatically after 1983, when the Air Force unit in Duluth shifted its mission from high level reconnaissance to a low level fighter-interceptor mission.[6] From 1983 to 1988, the number of sorties flown leaped from 153 to over 1,100, and increasingly BWCAW visitors complained of Air Force "sky jockeys" flying low over canoe country.[7] A 1988 visitor use survey of BWCAW visitors conducted by the Forest Service showed that over one third of wilderness visitors who returned the surveys complained of aircraft noise as a disturbance to their wilderness experience.[8]

The litigation sought to compel the Air Force to complete an Environmental Impact Statement for Snoopy MOA, and to enjoin Air Force overflights pending completion of such a study.[9] The case proceeded to a day long evidentiary hearing, including expert testimony on the adverse impacts of modern aircraft noise on the wilderness experience by, among others, Bill Worf, the principal draftsman of the Forest Service's Wilderness Act regulations,[10] and Dr. Miron (Bud) Heinselman, a retired Forest Service ecologist.[11]

After the hearing but before any final court ruling the parties settled, largely through the intervention of the Minnesota Air National Guard. The Air Guard sensed that a compromise by which the boundaries of the Snoopy MOA were modified to exclude the BWCAW would meet its need for training air space without jeopardizing the quietude and solitude of the wilderness experience. On Halloween 1989, the district court filed a stipulated settlement order which contained the following material terms:[12]

> 1. Pending reconfiguration of the Snoopy MOA, the Air Force "will operate no air combat training flights below 18,000 feet Mean Sea Level ('MSL') over the Boundary Waters Canoe Area Wilderness."
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> 2. The boundaries of Snoopy MOA would be moved south of the BWCAW.
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> 3. The Air Force "recognize[s] that the federal actions of establishing Military Operations Areas and scheduling ongoing air combat

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6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *See* George Nickas, *Exploring the implementation of the 1964 Wilderness Act by the Forest Service, The Bureau of Land Management, and the National Park Service, at* http://www.wildwilderness.org/wi/nicka.htm.
11. Friends of the Boundary Waters Wilderness v. Temple, No. 3-88-423 (D. Minn. 1989).
12. Order, Friends of the Boundary Waters Wilderness v. Temple, No. 3-88-423 (D. Minn. 1989) (No. 3-88-423).

> training operations are subject to the requirements of the National Environmental Policy Act."[13]

In light of the continuing controversy over aircraft overflights of national parks and wildernesses, notably civil aircraft over the Grand Canyon and military aircraft over Colorado, it is significant that, yet again, the Boundary Waters was on the leading edge of wilderness policy and litigation.

CURRENT POLITICAL CURRENTS

The November 2000 elections, and other changes, have affected some of the primary political figures who played roles in the recent Congressional legislative controversy over the BWCAW.

Department store heir Mark Dayton[14] defeated Senator Rod Grams (R-MN) in his effort to win re-election to the United States Senate.[15] Grams' effort to again divide the typically Democratic northern Minnesota vote over wilderness and public lands issues failed in 2000.[16] Dayton won handily in northern Minnesota and statewide.

Senator Paul Wellstone (D-MN) continues his service in the Senate.[17] His current term expires in early 2003; he had announced earlier that he would not serve for more than two terms, however, he has now announced that in light of the close political balance in the U.S. Senate, he will seek re-election in 2002.[18]

Representative Jim Oberstar (D-MN) easily won re-election to the House of Representatives to his 14th term by winning nearly 70% of the vote in Minnesota's 8th Congressional District.[19] The 66-year-old Oberstar retains his powerful seat as the ranking Democrat on the House Transportation and Infrastructure Committee.[20]

And Representative Bruce Vento (D-MN), the long-time champion of the BWCAW, died on October 10, 2000, from malignant mesotheli-

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13. *Id.*

14. *See* Gregory L. Giroux and Adam Graham-Silverman, *Quirky Minnesota Voting has some Incumbents on edge*, Congressional Quarterly, Nov. 4, 2000, *at* http://www.washingtonpost.com/ac2/wp-dyn/A15880-2000Nov4?language=printer.html.

15. *See Tremendous Victory for Choice in Minnesota: Dayton defeats anti-choice incumbent, wins U.S. Senate seat*, Nov. 8,2000, *at* http://www.naral.org/mediaresources/press/pr110800_dayton.html.

16. *See* Amy Radil, *Environmental Issues Lead Senate Debate*, Oct. 16, 2000, *at* http://news.mpr.org/features/200010/16_radila_sendebate/.

17. *See Paul Wellstone*, *at* http://www.senate.gov/~wellstone/Biography/biography.htm.

18. *See Minnesota Senator to seek 3rd term*, *at* http://jsonline.com/election2000/ap/jan01/ap-wellstone-senat011701.asp.

19. *See Election results*, *at* http://news.mpr.org/features/199908/01_newsroom_campaign2000/8thdistrict.shtml.

20. *See James L. Oberstar*, *at* http://wwwa.house.gov/oberstar/bio_ober.htm.

oma, a rare lung cancer associated with exposure to asbestos.[21] His elected successor, Representative Betty McCollum (D-MN), a strong environmentalist, has pledged to carry on Vento's legacy of protecting the Boundary Waters.[22]

21. *See Oberstar expresses great sadness at the passing of Bruce Vento, at* http://wwwa.house.gov/oberstar/ventodeath.htm.

22. *See Lori Sturdevant: Another woman whose campaign fell short of St. Paul mayor's office*, Sept. 27, 2001, *at* http://www.startribune.com/viewers/qview.php?slug=LORI27&template-print_a.